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No. 80-207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

CBS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:

RALPH E. GOLDBERG
CBS Inc.
51 West 52 Street
New York, New York
10019

JOSEPH DEFRANCO
CBS Inc.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
CBS Inc.

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QUESTIONS PRESENTED

Section 312(a)(7) of the Communications Act of 1934, 47 U.S.C. § 312(a)(7), authorizes the Federal Communications Commission (the "Commission") to revoke broadcast licenses for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time" by candidates for federal elective office. Before enactment of Section 312(a)(7), the Commission, while construing the Communications Act to require that broadcasters make available to candidates time for political broadcasts, had afforded broadcasters wide latitude in responding to individual candidate requests. In the present case, each of the three major commercial television networks declined to offer President Carter's campaign committee time for a thirty-minute paid political advertisement in December 1979, although CBS Inc. did offer two five-minute periods. By a four-to-three majority, the Commission held that Section 312(a)(7) creates a new, individual right of access for federal candidates and that all three networks had violated Section 312(a)(7). The court of appeals affirmed. The questions presented are:

1. Whether the court below erred in construing Section 312(a)(7) to create new and enlarged obligations for broadcasters, in light of the statutory language and legislative history and the contrary conclusion of this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).

2. Whether Section 312(a)(7), as construed by the Commission and the court below, violates the First Amendment by foreclosing good faith broadcaster editorial policy judgments designed to serve the public interest and the needs of all candidates in an evenhanded

fashion and by engaging the Commission in an inherently subjective, case-by-case determination of whether, when and how much time should be sold to individual candidates.[1]

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[1] The following were parties to the proceeding in the court of appeals: CBS Inc., American Broadcasting Companies, Inc., and National Broadcasting Company, Inc., petitioners; Federal Communications Commission and United States of America, respondents; Carter/Mondale Presidential Committee, Inc., and National Association of Broadcasters, intervenors.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CBS Inc. ("CBS") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of March 14, 1980, in *CBS Inc.* v. *Federal Communications Commission*, Nos. 79-2403, 79-2406 and 79-2407.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A.[2] The opinions of

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[2] The appendices are contained in a separately bound volume. American Broadcasting Companies, Inc. and National Broadcasting Company, Inc., which are filing separate petitions, have joined in these appendices.

the Federal Communications Commission are reported at 74 F.C.C.2d 631 (1979) and 74 F.C.C.2d 657 (1979), and appear as Appendices B and C.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. App. A at 2a. On May 15, 1980, the court of appeals denied petitions for rehearing filed by American Broadcasting Companies, Inc., National Broadcasting Company, Inc., and the National Association of Broadcasters. Appendix D.[3] On June 4, 1980, the time for filing this petition was extended to August 11, 1980, in an order signed by Mr. Chief Justice Burger. Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 312(a)(7) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(7), 315. These constitutional and statutory provisions are set forth in Appendix G.

STATEMENT OF THE CASE

Regulatory Background

Section 312(a)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(a)(7), provides that the Commission may revoke a broadcast station license for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time"

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[3] CBS also submitted a petition for rehearing, but an accompanying motion for leave to exceed the applicable page limitation was denied.

by a candidate for federal elective office. Before the enactment of Section 312(a)(7), it had been held that a broadcast licensee's obligation to act in the public interest included the obligation to sell or make available free time to political candidates.[4] In applying this policy, the Commission made clear that "the licensee's role in the area of political broadcasts is essentially the same as in other programming areas—to make good faith judgments as to how to meet his community's needs and interests."[5]

Against this background, Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971.[6] Early interpretations of the statute reflected the view that Section 312(a)(7) did not represent a significant departure from prior Commission practice. In a policy statement issued shortly after the enactment of Section 312(a)(7), the Commission stated that it would judge political access claims under that section by "the same test of reasonableness" it had developed in applying the fairness doctrine.[7] In 1973, this Court concluded that Section 312(a)(7) "essentially codified" the Commission's practice prior to enactment of that section.

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[4] *See Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959); *see also Hon. Dan Walker*, 57 F.C.C.2d 799 (1975).

[5] FCC Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time: Hearings before a Subcomm. of the House Comm. on Interstate and Foreign Commerce on H. J. Res. 247*, 88th Cong., 1st Sess. 90 (1963). The Commission has continued to apply this public interest standard to requests for access by state and local candidates, who are not mentioned in Section 312(a)(7). *E.g., Hon. Dan Walker*, 57 F.C.C.2d 799 (1975).

[6] Pub. L. No. 92-225, 86 Stat. 3 (1972).

[7] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972).

Columbia Broadcasting System, Inc. v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).

Thereafter, while suggesting that Section 312(a)(7) might impose some additional obligations on broadcasters,[8] the Commission often reaffirmed the view that Section 312(a)(7) placed maximum discretion in the broadcaster to determine the public interest in the sale of time. For example, in *Anthony R. Martin-Trigona*,[9] the Commission's Broadcast Bureau held that a broadcaster's discretion "extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence."[10] And, in a 1978 policy statement, the Commission again emphasized the substantial latitude for broadcaster judgment under Section 312(a)(7).[11]

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[8] *See Licensee Responsibility Under Amendments to the Communications Act Made by Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516 (1974).

[9] 66 F.C.C.2d 968 (Broadcast Bur. 1977), *on reconsideration*, 67 F.C.C.2d 743 (1978).

[10] 66 F.C.C.2d at 969; *see also* 67 F.C.C.2d at 746 n.4 (1978); *Summa Corp.*, 43 F.C.C.2d 602 (1973); *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974).

[11] *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1089 (1978). In that opinion, the Commission did express the view that Section 312(a)(7) created "a different, additional obligation" for broadcasters. *Id.* at 1088. But it stated that: "We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees." *Id.* at 1089.

Factual Background of This Case

On October 11, 1979, Gerald M. Rafshoon, President Carter's media adviser, asked CBS to offer the Carter/Mondale Presidential Committee, Inc. (the "Carter Committee") a thirty-minute paid program on the CBS Television Network between 8:00 p.m. and 10:30 p.m. EST during the period December 4 to 7, 1979. The program, which was to be run following President Carter's anticipated announcement of his candidacy for reelection on December 4, was described as "a documentary outlining the President's record and that of his administration." *See* App. A at 5a, n.4.

CBS responded to the request on October 17, 1979. *See* App. A at 6a-7a, n.5. CBS declined to offer at that time the half-hour requested by the Carter Committee, but did offer two five-minute periods, one in prime time and one in the daytime hours. Emphasizing the "large number of present and potential candidates for the Republican and Democratic presidential nominations," CBS noted that two Republican candidates had previously sought to purchase half-hour periods, and that CBS had declined to sell the time, although making the same offer of two five-minute periods it made to the Carter Committee. *Id.*[12]

Agency Proceedings

On October 29, 1979, the Carter Committee filed a complaint with the Commission alleging that CBS and the other two networks had violated Section 312(a)(7). In

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[12] The Committee made similar requests to the two other major commercial television networks, American Broadcasting Companies, Inc. and National Broadcasting Company, Inc. Each network declined to make a half hour available in early December, but did indicate that it would sell time later in the campaign; indeed, ABC indicated that it would be willing to sell one half-hour of time in the first week of January 1980. *See* Response of American Broadcasting Companies, Inc. at 6 (Nov. 5, 1979).

its response to the complaint, CBS contended that its position was reasonable. CBS stated that it had traditionally sold half-hour periods to presidential candidates during later campaign periods and that it intended to do so in the 1980 election. Response of CBS Inc. at 7 (Nov. 6, 1979). However, it stated that it was unwilling to sell half-hour periods at that early stage of the campaign. CBS pointed out that the campaigns for the presidential nominations consisted not of one national contest, but of a series of state delegate contests extending over a long period of time. *Id.* Noting that "rarely, if ever, has the CBS Television Network received so many requests to purchase program length time periods this far in advance of a presidential election," *id.* at 4, CBS emphasized the large number of actual and potential candidates for the Presidency [13] and the substantial disruption of regular programming that would occur if those candidates requested and were granted time. *Id.* at 8. In addition, CBS pointed out that its local affiliates would likely be confronted with numerous access requests from candidates for Congress and state and local offices, as well as from presidential candidates. *Id.* at 11.

By a vote of four to three, the Commission decided in favor of the Carter Committee on November 20, 1979, 74 F.C.C.2d 631, App. B, and reaffirmed that decision on petitions for reconsideration on November 28, 1979. 74 F.C.C.2d 657, App. C. In its decisions, the Commission

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[13] By early December 1979, President Carter, Senator Edward M. Kennedy and Governor Edmund G. Brown, Jr., had announced their candidacies for the Democratic presidential nomination. Among Republicans, Senators Howard Baker, Robert Dole, and Larry Pressler; Representatives Phillip Crane and John Anderson; and Ronald Reagan, John Connally, George Bush, Harold Stassen and Benjamin Fernandez had announced. *See* 74 F.C.C.2d at 645 n.20, App. B at 92a, n.20.

found that the language and legislative history of Section 312(a)(7) provided little direction. 74 F.C.C.2d at 637-38, App. B at 78a-80a. It concluded that Congress had delegated to it "broad responsibility to define and implement" Section 312(a)(7).[14] *Id.* at 638, App. B at 80a.

The Commission decided that the question of when the sale of time should begin was for the Commission, not the broadcaster, based on the Commission's "own independent evaluation of the status of the campaign." *Id.* at 665, App. C at 124a. In this case, the Commission found that the sale of time was appropriate because the presidential campaign was already "in full swing." *Id.* at 645, App. B at 92a.

Having determined that the networks could not refuse to sell time to presidential candidates on the ground that it was too early in the campaign, the Commission addressed the question of whether other considerations would make it reasonable for the networks to refuse the request for time. *See id.* at 665, App. C at 124a. The Commission stated that broadcasters must give special consideration to individual candidate "needs," *id.* at 642, App. B at 87a, and rejected the argument that broadcasters may properly adopt political sales policies designed to meet the needs of all candidates in an even-handed fashion. *Id.* at 668-69, App. C at 129a.[15] In-

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[14] The Commission also held that Section 312(a)(7) conferred on it jurisdiction to apply the "reasonable access" requirements of Section 312(a)(7) to unlicensed television networks, 74 F.C.C.2d at 638-40, App. B at 80a-84a, despite the fact that Section 312(a)(7) in terms refers only to the revocation of station licenses or construction permits.

[15] The Commission did suggest that broadcasters may consider the needs of all candidates in general, 74 F.C.C.2d at 668-69, App. C at 129a, but it did not explain how a broad-

stead, the Commission stated that it expected a broadcaster "to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime." *Id.* at 666, App. C at 128a. Judgments as to the amount of time a candidate needs "are best left to the discretion of the candidate and his media adviser." *Id.* at 667, App. C at 127a.[16]

While holding that broadcasters may find that "countervailing factors" outweigh stated candidate needs, the Commission sharply limited broadcaster judgment in

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caster can adopt policies aimed at even-handed treatment of all candidates and yet vary his responses to particular requests in order to satisfy individual candidate demands.

[16] While the Commission indicated that the licensee retains some discretion to judge the reasonableness of a candidate's assessment of his own needs "in the broad sense," 74 F.C.C.2d at 642, App. B at 88a, it may not "substitute its judgment regarding the candidate's needs." *Id.*, App. B at 87a-88a. In the same vein, the licensee is not expected to evaluate "the 'political' importance or urgency of individual candidate needs in terms of a particular candidate's situation in the campaign, *e.g.*, where he stands in the polls or how he has fared in specific primaries." *Id.* at 667, App. C at 127a. But the licensee must consider the candidate's allegations of need, such as the need to discuss "a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests," *id.* at 668, App. C at 128a, and the need for a statement of the candidate's position and record that "could not be accomplished later." *Id.*, App. C at 129. The Commission rejected CBS' argument that, if the individual needs of the candidate are to be given predominant weight, then CBS should be able to take into account the President's unparalleled access to the media. *Id.* at 669-70, App. C at 130a-131a.

evaluating those factors.[17] Thus, for example, broadcasters are not permitted to take into account the likelihood of multiple future requests by similarly situated candidates unless the imminence of such requests can be shown to a near certainty.[18]

On the basis of this approach, the Commission held the position of all three networks to be unreasonable. The Commission found that CBS' offer to sell two five-minute periods "might be reasonable under some circumstances." *Id.* at 650, App. B at 100a. But since CBS' offer was the

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[17] Apart from the individual needs of the candidate, the the Commission held that a broadcaster may consider such factors as the likelihood of multiple candidate requests, *see* 74 F.C.C.2d at 647, App. B at 95a-96a; the potential disruption of regular programming, *see id.* at 648, App. B at 97a; and the amount of time previously afforded a particular candidate. *Id.* at 667, App. C at 126a-27a. CBS' initial letter to the Carter Committee emphasized the first two factors. *See* App. A at 6a-7a, n.5.

[18] The Commission required broadcasters to "attempt to appraise the likelihood" of multiple requests at each stage of the campaign. 74 F.C.C.2d at 667, App. C at 126a. It encouraged broadcasters to consult with all candidates in order to ascertain their plans and achieve a coordinated result. *Id.* It did not suggest that the candidates are required to disclose their plans or to make firm commitments.

Many requests from similarly situated candidates might have to be granted under Section 315(a) of the Act, 47 U.S.C. § 315(a), which requires that licensees that make available the use of their station to candidates for an office afford equal opportunities to all other candidates for that office. *See also* 47 C.F.R. § 73.1940(e) (1979) (providing seven days for candidate to request equal opportunities); *Kennedy for President Committee* v. *FCC* (*"Kennedy II"*), No. 80-1549, slip. op. at 8 (D.C. Cir. Aug. 6, 1980) ("Sections 312(a)(7) and 315(a) . . . work in tandem to govern access to broadcast media by candidates for public offices").

same as the one made in response to requests by two Republicans, the Commission inferred that a "blanket" policy had been set prior to consideration of the Carter Committee's request, demonstrating that CBS had failed to take account of President Carter's particular needs for a thirty-minute program. *Id.* at 649-50 & n.32, App. B at 99a-101a & n.32. The Commission also found the concerns raised by CBS as to multiple candidate demands and disruption of network and station programming to be too remote and speculative to justify a refusal to honor the Carter Committee's request. *Id.* at 647-50, App. B at 95a-101a.

Finally, the Commission declined to decide whether its construction of Section 312(a)(7) was constitutional, holding that this was a matter for the courts, rather than the Commission, to decide. *Id.* at 665, App. C at 123a.[19] One member of the Commission majority, however, did express his view that Section 312(a)(7) violated the First Amendment. *See id.* at 655, App. B, at 108a (statement of Commissioner Quello).

Commissioner Lee, in dissent, stated that the majority's standard meant "that the networks do not have any choice other than to give the requested time." *Id.* at 681, App. C at 150a. In a separate dissent, Commissioner Washburn agreed, noting that

> "the document adopted by the majority today goes far beyond the proper limits of Commission responsibility in political broadcasting matters. In detail . . . it substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such government intrusion is unwarranted, is illegal

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[19] *See also Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1094 (1978).

and, I fear, will have far-reaching consequences that will come back to haunt the Commission and the public again and again." *Id.* at 682, App. C at 151a.

Decision Below

Since the Commission decision appeared to depart in several ways from the policies it had previously followed, and to limit substantially broadcaster judgment in the sale of political time, CBS and the other networks sought review in the court below.[20] The Commission's decision was affirmed by a panel of the court of appeals composed of Senior Circuit Judge Bazelon, Circuit Judge Tamm and Chief Judge Markey of the Court of Customs and Patent Appeals. In an opinion by Judge Bazelon, the court essentially adopted the approach of the Commission, concluding that Congress in enacting Section 312 (a) (7) intended to create "a new right of affirmative access for candidates to federal elective office." App. A at 14a. The court dismissed as "dictum" this Court's statement in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee ("CBS* v. *DNC")*, 412 U.S. 94, 113-14 n.12 (1973) that Section 312(a) (7) "essentially codified" prior Commission practice. App. A at 20a. The court decided that this Court's treatment of the question was "not controlling" because it was "cur-

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[20] Each network filed a petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

The court of appeals stayed the Commission's order on November 29, 1979. *See* App. A at 10a-11a. Following the seizure of American Embassy personnel in Iran, the Carter Committee decided not to continue to seek a 30-minute period in the December 4-7 period. Consistent with its earlier response, CBS offered, and the Committee purchased, a five-minute period on December 4. The Committee also obtained a 30-minute period from ABC in early January and declined a similar offer from NBC. *See id.* at 11a. For reasons cited below, *see* note 26 *infra*, all parties and the court agreed that the case is not moot.

sory" and had "strayed far from what was before the Court." *Id.* at 20a-21a.

The court agreed with the Commission that determination of when the sale of time should commence is not an "editorial decision" but rather "purely a legal judgment" for the Commission. *Id.* at 28a. The court found CBS to have acted unreasonably because, in making the Committee the same offer of two five-minute periods previously made to the two Republican candidates, it had adopted an "across-the-board" policy and had failed to "tailor [its] response to the *individual* candidate." *Id.* at 39a-40a (emphasis in original).

The court below rejected the networks' contention that Section 312(a)(7), as construed by the Commission, violated the First Amendment. Finding that "Section 312(a)(7) represents only a congressional re-allocation of the 'use' of portions of the airwaves from the licensee to the candidate," the court concluded that the "broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired." *Id.* at 47a.[21]

In a separate opinion, Judge Tamm expressed grave concern about the Commission's actions. In his view, the Commission had come "perilously close to falling into the chasm of impermissible government action" violative of the First Amendment. *Id.* at 68a.[22] He noted that, in

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[21] The court below also concluded that, despite the language of Section 312(a)(7), Congress intended that the section apply to television networks, and that, in any event, such authority was "reasonably ancillary" to its authority over individual stations. App. A at 48a-52a, *citing United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[22] The majority below gave short shrift to these concerns, noting only, in a footnote, that it "welcomed the admonition regarding agency conduct" contained in Judge Tamm's opinion. App. A. at 47a, n.117.

contrast to the role of the Commission in application of the fairness doctrine, the more expansive role claimed by the Commission under Section 312(a)(7) involved a significant danger that a government agency would consciously or unconsciously favor particular speakers or ideas. *Id.* at 60a-67a. Judge Tamm joined the majority, however, because he construed the networks' policies as "flat bans" on the sale of the type of time that the Committee sought in early December. *Id.* at 68a.[23]

REASONS FOR GRANTING THE WRIT

As construed by the Commission and the court of appeals, Section 312(a)(7) of the Communications Act is the only statutory provision that grants to a specific class of individuals a right to command use of the broadcast media for the presentation of their views.[24] In reaching that construction of the statute and sustaining it against attack on First Amendment grounds, the court below has decided statutory and constitutional questions of profound importance to political candidates, broadcasters and the public at large. These questions warrant review by this Court.

The radically new right of access that the Commission and the court below have found in the statute will trans-

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[23] Petitions for rehearing and suggestions for rehearing *en banc* were denied. Circuit Judge MacKinnon would have granted rehearing *en banc*. Appendices D, E.

[24] The court of appeals characterized the right of access at issue as an "affirmative" right of access. App. A at 14a. Such rights are sharply different from "contingent" rights of access, such as the right of reply to personal attacks, 47 C.F.R. § 73.1920 (1979), and the equal opportunities rule, 47 U.S.C. § 315(a), that come into play only after a programming decision is made by the licensee. In this case granting mandatory access under Section 312(a)(7) carries with it further contingent access obligations under Section 315(a).

form the process by means of which station and network facilities are made available for political broadcasts. Until this case, that process had been governed essentially by the good faith, independent judgments of broadcast licensees, subject to the "equal opportunities" requirement of Section 315(a) and to overall review by the Commission under the Act's public interest standard. Under the decision below, the role of the broadcaster will be sharply constricted and the role of the Commission will be correspondingly enlarged.

Upon complaint by any dissatisfied federal candidate, the broadcaster will have the burden of persuading the Commission that the individual candidate's stated needs are outweighed by countervailing factors. The broadcaster will not be permitted to rely upon general policies designed to meet the needs of all candidates evenhandedly. Nor will he be permitted to project the possible demands of other candidates. In addition to impinging on traditional broadcaster responsibility in programming matters, the decisions below, by giving the candidate and the Commission the power to make programming judgments in particular cases based on individual candidate needs, disserve the public interest in balanced television programming by restricting the broadcaster's ability to exercise his editorial judgment.

Such a regulatory scheme thrusts the Commission into a "continuing, case-by-case determination of who should be heard and when," *CBS* v. *DNC*, *supra*, 412 U.S. at 127. The dangers of such a system of enforced access to the broadcast media are especially profound in the highly charged arena of political broadcasting, where government decisions as to time allocations are plainly susceptible to the appearance of partiality. Those dangers are gravely exacerbated by a system that would require the Commission repeatedly to assess the weight that should be given to the needs of individual candidates and the adequacy of broadcaster responses to those needs.

The practical impact of the decision below will be substantial. Networks have received numerous requests for time, not only long before the nominating conventions, but even well before the first primaries. Individual stations receive requests from presidential candidates for time during state primaries occurring within their service areas. Stations will also receive requests from candidates for the Senate and House of Representatives, who are also granted rights of access under Section 312 (a) (7).

The wide-ranging interpretations of the statute by the Commission and the court of appeals in this case will have a substantial impact on all future cases arising under Section 312(a) (7) and have already been relied on frequently by complainants, the Commission and the courts as defining the basic standards under the statute.[25] The impact of the decisions below is no less than if the Commission had established wide-ranging requirements after a rulemaking, since the Commission's pronouncements are designed to set standards for guidance in all future cases. It is to be anticipated that in the congressional elections of 1982 and the presidential elections of 1984 questions as to the scope of Section 312(a) (7) will again arise with substantial frequency. The

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[25] *E.g., Kennedy for President Comm.* v. *FCC ("Kennedy II")*, No. 80-1549 (D.C. Cir. Aug. 6, 1980) (reaffirming the decision in this case, but holding that Section 312(a) (7) does not require broadcaster to make available free time to a candidate when he offers to sell time); *Kennedy for President Comm.*, 46 Pike & Fisher Rad. Reg. 1539 (Broadcast Bur. 1980) (station offer to permit candidate to share half-hour with three other candidates does not constitute "reasonable access" in view of candidate's stated need for half-hour to present recorded speech); *see also Kennedy for President Comm.* v. *FCC* (*"Kennedy I"*), No. 80-1482, slip op. at 16-17 n.61 (D.C. Cir. Aug. 6, 1980).

present case provides a unique opportunity for this Court to consider these questions in advance of those elections, to render a definitive construction of the statute, and to resolve the constitutional issues.[26] *Cf. Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

I. THE COURT BELOW HAS DECIDED AN IMPORTANT STATUTORY QUESTION CONTRARY TO A DECISION OF THIS COURT

Central to this case is the holding of both the Commission and the court of appeals that in enacting Section 312(a)(7) Congress did not intend to codify the Commission's prior practice under the public interest standard, but rather to "enlarge" broadcaster duties, 74 F.C.C.2d at 644 n.17, App. B at 90a, n.17, and to create a new individual right for federal candidates. While the language of the statute[27] is somewhat uncertain, as the

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[26] All the parties agree that the controversy is not moot, and the court of appeals so held, App. A at 52a-54a, on the ground that the controversy is one capable of repetition, yet evading review. *Gannett Co.* v. *DePasquale*, 435 U.S. 368, 377-78 (1979); *see also Richmond Newspapers, Inc.* v. *Virginia*, 48 U.S.L.W. 5008, 5010 (July 2, 1980). The case is also not moot because the Commission's finding that the networks acted unreasonably might be urged as a basis for further Commission action in other regulatory proceedings, *see Ginsberg* v. *New York*, 390 U.S. 629, 633-35 n.2 (1968), and because the Commission has decided a number of broad policy questions that go beyond the factual setting of the case and that are of a kind that are routinely reviewed by courts. *E.g., Pacifica Foundation* v. *FCC*, 181 U.S. App. D.C. 132, 556 F.2d 9 (1977), *rev'd*, 438 U.S. 726 (1978).

[27] The language of the statute and its placement in Section 312 of the Act suggest that subsection (a)(7) merely authorizes a new remedy (license revocation) for "willful or repeated" violation of an obligation to federal candidates, the

Commission found, *id.* at 637, App. B at 78a, the Commission's (and the court's) view of the statute is inconsistent with fundamental premises of the Communications Act, contrary to the legislative history of Section 312(a)(7) and contrary to this Court's own past construction of the statute.

Section 312(a)(7) was enacted against a long tradition of not affording rights of access in the first instance.[28] This Court has often recognized that Congress in enacting the Communications Act decided that the public interest would best be vindicated by a system of public trusteeship, rather than by treating broadcast licensees as common carriers subject to an obligation to make time available to any individual wishing to transmit a message.[29] In *CBS* v. *DNC*, *supra*, this Court extensively canvassed the legislative history and concluded that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent

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content of which is described as the provision of "reasonable access." That the section speaks of providing access or time to "a candidate," rather than to "candidates," *see* App. A at 15a, is immaterial. The Commission had long entertained complaints by individual candidates concerning their treatment by broadcasters under the public interest standard. But it measured broadcaster response to such complaints by the adequacy of the broadcaster's overall efforts in providing access to all candidates in significant races. *See, e.g., WROX*, 40 F.C.C. 339 (1962); *Grover C. Doggette*, 40 F.C.C. 346 (1962).

[28] This is to be contrasted with so-called "contingent" rights of access, which come into effect only after an initial programming decision by the broadcaster. *See* note 24 *supra*.

[29] Congress expressly provided in Section 3(h) of the Act, 47 U.S.C. § 153(h), that a broadcaster "shall not . . . be deemed a common carrier." *See FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

with its public obligation." 412 U.S. at 110. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), this Court recently held that the Commission's proposed mandatory access rules for cable television exceeded the Commission's statutory authority. This Court confirmed "the policy of the Act to preserve editorial control of programming in the licensee." *Id.* at 705; *see id.* at 708. Congress should not lightly be deemed—in Section 312(a)(7)—to have intended an important modification of a well-established statutory plan, particularly where such a change would raise substantial constitutional questions. *See* pp. 23-25 *infra.*

In *CBS* v. *DNC*, this Court found that no such modification had been intended. There the issue was whether broadcasters were required to sell time to a major political party and others seeking to buy time in order to influence the electorate. This Court emphasized that, notwithstanding amendments to the Act (including Section 312(a)(7)), and frequent congressional consideration of "various proposals that would have vested private individuals with a right of access," no individual or group has been given "a right to command the use of broadcast facilities." 412 U.S. at 113-14. In support, this Court pointed to Section 312(a)(7) and expressly concluded that the section:

> "essentially codified the Commission's prior interpretation of Section 315(a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U.S. 525, 534 (1959). *See* FCC Memorandum on Second Sentence of Section 315(a) in Political Broadcasters-Equal Time, Hearings Before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90." 412 U.S. at 113-14 n.12.

The court of appeals' facile characterization of this Court's conclusion as "dictum," App. A at 20a, simply

cannot be reconciled with this Court's reliance on its interpretation of Section 312(a)(7) as support for one of its central conclusions in *CBS* v. *DNC*.[30]

The legislative history fully supports this Court's view of the meaning of Section 312(a)(7). The report of the Senate Commerce Committee stated expressly that the obligation imposed by Section 312(a)(7) was already "inherent in the requirement that licensees serve the needs and interests" of the community of license. S. REP. No. 96, 92d Cong., 1st Sess. 34 (1971). The report also noted that the FCC had recognized the obligation as part of a licensee's responsibility under the public interest standard,[31] and stressed that under the statute the Commission "should *continue to consider* the extent to which each licensee has satisfied his obligation." *Id.* at 28 (emphasis added). Contrary to the court of appeals'

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[30] The Commission similarly attempted to dismiss this Court's statement in *CBS* v. *DNC* on the ground that "the Court did not . . . have the benefit of an interpretation by the agency with the obligation of enforcing" the statute. 74 F.C.C.2d at 662, App. C at 119a. In fact, this Court did have before it a contemporaneous view of the statute by the Commission. In its brief in that case, the Commission referred to the same authorities relied on by this Court and stated that the public interest standard entailed an obligation to make time available to candidates on a "reasonable basis." It continued:

> "*Congress has now codified this duty* to the limited extent of permitting the Commission to revoke licenses 'for willful or repeated failure to allow reasonable access . . . .' *Except to the extent modified, Congress has adhered to the original policy adopted in 1927.*" Brief of FCC in *CBS* v. *DNC* at 42-43 n.37 (emphasis supplied).

[31] S. REP. No. 96, *supra*, at 34, *citing Programming Inquiry*, 44 F.C.C. 2303 (1960).

decision, nothing in the history of Section 312(a)(7) indicates a congressional purpose to provide "greater access" than was provided under this pre-existing Commission policy.[32]

Indeed, enlarging the broadcaster's obligation to make available time would have been contrary to the purposes of the Federal Election Campaign Act of 1971—to reduce the cost of political campaigns and to shorten them.[33] The Senate Committee expressed concern that "[i]f candidates were given complete discretion to spend on the use of this media your Committee was fearful that in the closing months of a campaign the airwaves might become inundated with political broadcasts to the exclusion of entertainment and other public interest programs." S. REP. No. 96, *supra*, at 30. Moreover, there is reason to believe that members of Congress felt that the exercise by broadcasters of their judgment in responding to requests from candidates to purchase time would substantially alleviate the danger of inundation.[34] The Commission's

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[32] The snippets of contemporaneous history cited by the Commission and the court of appeals, *see* App. A at 17a, 74 F.C.C.2d at 637, App. B at 78a, to show a congressional purpose to afford "greater access" to candidates, in fact referred to other enumerated provisions of the bill, such as a proposal to repeal the "equal opportunities" provision of Section 315(a). *See* S. REP. No. 96, *supra*, at 20; S. REP. No. 229, 92d Cong., 1st Sess. 56 (1971); 117 CONG. REC. 28,792 (1971) (statement of Sen. Pastore).

[33] S. REP. No. 96, *supra*, at 22-28 (1971); 117 CONG. REC. 28,813 (1971) (remarks of Sen. Prouty).

[34] S. REP. No. 229, 92d Cong., 1st Sess. 118 (1971) (Supplemental Views of Messrs. Prouty, Cooper, and Scott); *see Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 92d Cong., 1st Sess. 54 (1971) (testimony of Richard Kleindienst).

decision here deprives broadcasters of the right to exercise their editorial responsibility in the interests of the viewing public, and has the effect of encouraging candidates to seek greater access to the media and to engage in an ever-escalating effort to present competing political broadcasts, thereby lengthening campaigns and making them even more costly. Preservation of wide latitude for network judgments during the period of the primary campaigns would appear to be particularly important in this context since it is extremely doubtful that Congress intended any obligation to be imposed on networks to sell time on a national basis during the period of these individual state primary contests.[35]

Moreover, the requirement of the decisions of the Commission and the court below that broadcasters judge each candidate's "needs" individually and tailor a response to those needs cannot be reconciled with the congressional policy in favor of even-handed treatment in political broadcasting matters. In Section 315(a) of the Act, 47 U.S.C. § 315(a), Congress required that any station that makes the use of its facilities available to a candidate for public office must provide "equal opportunities" to all other candidates for that office. There is no suggestion that Section 312(a)(7) was intended to depart from this approach of candidate equality.[36]

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[35] In a companion provision added by the Federal Election Campaign Act of 1971, Section 315(b), 47 U.S.C. § 315(b), Congress provided that broadcast stations must make available to political candidates time at their lowest unit rate during the 45 day period prior to a primary election. Congress surely did not intend that networks must make available their lowest unit rate prior to every primary, for that would have the effect of making the lowest unit rate provision applicable to the networks for the greater part of a year.

[36] The Commission conceded that sale of the requested half-hour to the Carter Committee would make it difficult to justify a refusal to sell comparable periods to candidates for

In addition to being contrary to the evident congressional purposes, the Commission's decision here is also contrary to prior Commission construction of the statute. Before this case, the Commission had, in keeping with the congressional purpose to preserve wide latitude for broadcaster judgment, defined the phrase "reasonable access" by analogy to broadcasters' obligations under the fairness doctrine.[37] The cornerstone of that doctrine, which imposes upon broadcasters the obligation to cover issues of public importance and to present contrasting views on those issues, is reliance on broadcasters' good faith decision as to how best to satisfy those obligations.[38]

Certiorari should be granted to resolve this important statutory question.

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the Republican presidential nomination. 74 F.C.C.2d at 647, App. B at 95a. It suggested, however, that a different result might obtain in the case of minor party candidates. *Id.* at 647 n.28, App. B at 95a, n.28. Yet to the extent the Commission suggests the "needs" of the individual candidate are of central importance, it can be argued that the needs of minor party candidates for public exposure are greater than those of Democratic and Republican candidates.

[37] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972).

[38] *CBS* v. *DNC*, 426 U.S. at 127; *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979), *Fairness Report*, 48 F.C.C.2d 1, 8 (1974); *Fairness Primer*, 40 F.C.C. 598, 599 (1964); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251 (1949). Whether or not Section 312(a)(7) codified prior practice, use of a reasonability standard necessarily invites reference to standards of broadcaster responsibility developed in the context of the Commission's fairness doctrine.

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION AS TO THE CONSTITUTIONALITY OF MANDATORY ACCESS THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

If petitioner's statutory arguments are rejected, this case requires the Court to consider, for the first time, the constitutionality of a congressionally-imposed requirement of mandatory access to the broadcast media.

In two important earlier cases, this Court, while resting its decision on statutory grounds and not reaching the constitutional questions, looked with disfavor on proposals for compulsory access. In *CBS* v. *DNC*, *supra*, the Court held that neither the Communications Act nor the First Amendment compelled broadcasters to provide access to individuals wishing to purchase time to express their views on public issues. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), the Court held that Commission regulations establishing access requirements for cable television systems exceeded the Commission's statutory authority, and made clear that similar access requirements in broadcasting would also violate the statute. *Id.* at 704-05. Noting that the lower Court in that case had found that the access regulations violated the First Amendment, the Court recognized that the question of the constitutionality of government-imposed access systems was a substantial one.[39] *Id.* at 709 n.19.

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[39] In *PruneYard Shopping Center* v. *Robins*, 100 S. Ct. 2035 (1980), this Court again made clear that rights of access to the journalistic media raise substantial questions, in holding that a state constitutional principle requiring access to a shopping center "obviously" did not involve an "intrusion into the function of editors." *Id.* at 2044, *quoting Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974).

Important constitutional principles of preservation of broadcaster judgment in editorial matters underlie this Court's view of the requirement of the Communications Act. These principles cannot simply be dismissed, as the court of appeals attempted to do, by characterizing Section 312(a)(7) as a "congressional reallocation of the 'use' of portions of airwaves from the licensee to the candidate." App. A at 47a. In *CBS* v. *DNC*, this Court rejected the view (advanced by the lower court in that case and adopted again by the court of appeals here) that a broadcaster's journalistic discretion is limited to the "right to speak and editoralize." App. A at 47a. Rather, the editorial function as described by this Court extends to determining "who should be heard and when." 412 U.S. at 127. Similarly, this Court rejected the notion that "every potential speaker is 'the best judge' of what the listening public ought to hear." It stressed that:

> "All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 124

Thus, this Court found that the Communications Act places primary reliance on broadcasters, not the Commission, to exercise editorial responsibility in the interests of the entire viewing public. *Id.* at 125.

This Court in *CBS* v. *DNC* also emphasized that "a right of access system would tend to draw [the Commission] into a continuing case-by-case determination of who should be heard and when." 412 U.S. at 127. The dangers of government intrusion inherent in any access system are exacerbated by the access scheme at issue in this case, under which candidates for federal office seek time and those candidates, particularly the President, are in a position to influence Commission appointments, Commission budgets, and ultimately, Com-

mission decision-making.[40] As Judge Tamm noted in his separate opinion, "there is some evidence that the Commission has, on occasion, been subjected to direct political pressure." App. A at 64a, n.16. This danger is further exacerbated by the emphasis on the subjective "needs" of the individual candidate who seeks access; as a result, "an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves." *Id.* at 63a. Thus, the political sensitivity of requests for access under Section 312(a)(7) raises "the serious danger of non-neutral government action favoring one speaker over another." *Id.* at 67a.

Certiorari is warranted to decide this important question of the constitutionality of mandatory access systems.

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[40] These dangers are highlighted by the Commission's approach to enforcing its decisions. On reconsideration, the Commission rejected the networks' petitions for a stay pending judicial review, directing the networks to inform it within twenty-four hours of "how they intend to meet their Section 312(a)(7) obligations," and warning of "specific measures . . . to remedy any continued failure to comply. 74 F.C.C.2d at 676-77, App. C at 142a. Moreover, the Commission suggested in the course of these proceedings that it might impose sanctions where the licensee initially rejects a request and fails to convince the Commission of the reasonableness of his position. *See* Respondents' Memorandum on Question of Mootness, at 3-4 (Dec. 19, 1979).

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

Of Counsel:

RALPH E. GOLDBERG
CBS Inc.
51 West 52 Street
New York, New York
10019

JOSEPH DEFRANCO
CBS Inc.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
CBS Inc.

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80-207

Nos.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

APPENDICES TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(List of counsel on inside cover)

Of Counsel:

RALPH E. GOLDBERG
CBS Inc.
51 West 52 Street
New York, New York 10019

JOSEPH DEFRANCO
CBS Inc.
1800 M Street, N.W.
Washington, D.C. 20036

EVERETT H. ERLICK
ROBERT J. KAUFMAN
American Broadcasting
Companies, Inc.
1330 Avenue of the Americas
New York, New York 10019

HOWARD MONDERER
Vice President, Law
National Broadcasting
Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON &
KITTNER
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioner National Broadcasting Co., Inc.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2403

CBS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC., NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Intervenors

No. 79-2406

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents

NATIONAL ASSOCIATION OF BROADCASTERS, CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.,
Intervenors

No. 79-2407

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Intervenors

Petitions for Review of Orders of the
Federal Communications Commission

Argued January 10, 1980

Decided March 14, 1980 [Judgment Entered This Date]

Timothy B. Dyk, with whom *J. Roger Wollenberg*, *Thomas W. White* and *Joseph DeFranco* were on the brief, for petitioner in No. 79-2403.

Thomas N. Frohock, with whom *James A. McKenna, Jr.* and *Carl R. Ramey* were on the brief, for petitioner in No. 79-2406.

Floyd Abrams, with whom *Dean Ringel*, *George Freeman* and *Howard Monderer* were on the brief, for petitioner in No. 79-2407.

Robert R. Bruce, General Counsel, Federal Communications Commission, with whom *David J. Saylor*, Deputy

General Counsel, *Terry Michael Banks*, Associate General Counsel, *C. Grey Pash, Jr.*, Counsel, Federal Communications Commission, and *John J. Powers, III*, Attorney, Department of Justice, were on the brief, for respondents.

John D. Lane, with whom *Ramsey L. Woodworth*, *Howard K. McCombs* and *Anthony F. Essaye* were on the brief, for intervenor, Carter/Mondale Presidential Committee.

Erwin G. Krasnow was on the brief for intervenor, National Association of Broadcasters.

Heidi P. Sanchez was on the brief for Amici Curiae, National Citizens Committee for Broadcasting, et al., urging affirmance.

Bruce E. Fein, Attorney, Department of Justice, also entered an appearance for respondent, United States of America.

Jerry W. Markham also entered an appearance for intervenor, Carter/Mondale Presidential Committee.

Before: BAZELON, *Senior Circuit Judge*; TAMM, *Circuit Judge*; and MARKEY,* *Judge*, United States Court of Customs and Patent Appeals.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Concurring opinion filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge*: In these consolidated appeals, the three major television networks seek review of orders by the Federal Communications Commission (FCC) finding that they had failed to fulfill their obligation under Section 312(a)(7) of the Communications Act [1] to permit "purchase of reasonable amounts of time

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

[1] 47 U.S.C. § 312(a)(7) (1976). Section 312(a)(7) was added to the Communications Act of 1934 as part of the Fed-

for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." [2]

In October, 1979, the Carter-Mondale Presidential Committee (CMPC) asked that the three networks make available to it a half-hour of television time in early December, 1979. The networks declined to do so. CMPC filed a complaint with the FCC charging a violation of Section 312(a)(7). The Commission concluded that the response of each of the networks to the Committee's request to purchase time was unreasonable because the networks had failed to apply the proper legal standard in denying the request.[3] It ordered the networks to comply with the requirements of the Act. The networks appealed. We affirm.

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eral Election Campaign Act of 1971. Title I of that 1971 bill, which contained Section 312(a)(7), was known as the Campaign Communications Reform Act and was the broadcast reform section of the law.

[2] 42 U.S.C. § 312(a)(7) (1976). The relevant parts of Section 312 read in full:

> (a) The Commission may revoke any station license or construction permit . . .
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[3] Carter-Mondale Presidential Committee, Inc., —— FCC 2d —— (FCC 79-750, Nov. 21, 1979) (herein Order I), *reconsideration denied*, —— FCC 2d —— (FCC 79-773, Nov. 28, 1979) (herein Order II). Order I is found in the Appendix (App.) at 114; Order II is at 305.

I. THE SITUATION

On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, wrote each of the three major television networks, asking that they make available a 30-minute program slot between 8:00 PM and 10:30 PM on either December 4, 5, 6 or 7.[4]

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[4] The text of Mr. Rafshoon's letter to the three networks was identical:

> On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on ABC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for the Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.
>
> As you know, the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.
>
> Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16-18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 22 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above time seems eminently appropriate in view

CMPC intended to present a documentary outlining President Jimmy Carter's record and that of his administration. The program was to be presented just after the President's formal announcement of his candidacy, and it was designed to set the tone for the President's campaign.

The networks declined to make the requested time available—saying in essence that it was too much time, too soon in the race. CBS offered to make two 5-minute segments available; one in prime time (10:55 PM) on December 8, and one in the daytime class.[5] ABC told

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of the escalating political climate already generated by both print and broadcast media.

I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

App. at 11-12.

[5] The letter to Mr. Rafshoon from Raymond E. Dillon, Director of Political Sales at CBS, was dated October 17, 1979, and read:

Dear Mr. Rafshoon:

This is in response to your request that the CBS Television Network make available for purchase by the Carter/Mondale Presidential Committee, Inc., a half-hour program in prime time to be broadcast between 8:00 and 10:30 PM EST on December 4, 5, 6 or 7, 1979.

Because of the large number of present potential candidates for the Republican and Democratic presidential nominations, we are at this time unable to accede to your request to purchase a half-hour program. We note that three Democrats and eleven Republicans have already announced, or may reasonably be expected shortly to announce, their presidential candidacies; indeed two candidates for the Republican presidential nomination have already requested to purchase half-hour programs

CMPC that it had not yet reached a decision as to when it would commence the sale of political time for the 1980

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on the CBS Television Network, and their requests have been declined on the same basis as indicated below.

In light of the above circumstances, were we to provide the half-hour program you seek, accommodating potential requests for equal treatment from other candidates for presidential nomination would involve massive disruptions of the regular entertainment and information schedule of the CBS Television Network. Accordingly, we must respectfully reject your request.

We are, however, prepared to make one 5-minute segment in prime time and one 5-minute daytime segment available for purchase by your committee. We note that this is the same offer made to the Republican candidates referred to above in response to their requests to purchase half-hour time periods.

While we are unable to make available time on the dates you have specified, we are able to offer for your purchase a 5-minute period on December 8 between approximately 10:55 and 11:00 PM. We will also provide a specific 5-minute daytime availability for your purchase on request.

Since it is CBS' policy to sell time only to announced candidates for public office, this offer is, of course, conditional upon President Carter's having announced, or using the time purchased to announce, his presidential candidacy.

If you are interested in purchasing such a program or programs, please notify us promptly since substantial lead time of approximately four to five weeks is necessary for the editing required to accommodate program segments of this length.

Very truly yours,

App. at 19-20.

Presidential campaign, but that it would do so shortly.[6] It subsequently indicated that it would begin such coverage in January, 1980.[7] NBC simply indicated that it was not prepared to sell time for political programs in December, a month "too early in the political season for nationwide broadcast time to be made available for paid political purposes." [8]

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[6] The letter to Mr. Rafshoon from Charles C. Allen, Vice President for Sales Administration at ABC, was dated October 23, 1979, and read:

> Dear Mr. Rafshoon:
>
> This is to confirm my oral response given on October 16th to your letter of October 11, 1979 to Mr. Elton H. Rule, President of American Broadcasting Companies, Inc., requesting air time for the Carter/Mondale Presidential Committee, Inc. on December 4, 5, 6 or 7, 1979.
>
> As we discussed, the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential campaign, and, accordingly, we are not in a position to comply with your request. As I mentioned on the telephone, I believe that later this year a decision will be made to make political time for the Presidential campaign available on ABC-TV early next year.
>
> It was a pleasure speaking with you last week.
>
> Sincerely yours,

App. at 17.

[7] Letter of Counsel for American Broadcasting, Inc., to the Chief of the Complaints and Compliance Division of the Federal Communications Commission, November 5, 1979. App. at 29.

[8] The letter to Mr. Rafshoon from Joseph J. Iaricci, Vice President for Sales and Administration at NBC, was dated October 23, 1979, and read:

On October 29, 1979, CMPC filed with the FCC a complaint charging that the networks had violated their obligation to provide "reasonable access" pursuant to Section 312(a)(7). At an open meeting on November 20, 1979, the Commission found by a four-to-three vote that the networks had violated Section 312(a)(7). It issued a detailed Memorandum Opinion and Order (Order I) the next day [9] directing the networks to indicate by No-

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Dear Mr. Rafshoon:

This is in response to your letter of October 11, 1979 to Mr. Fred Silverman, on behalf of the Carter/Mondale Presidential Committee, Inc., requesting 30-minute availabilities on NBC between 8:00 and 10:30 PM, EST, on December 4, 5, 6 or 7, 1979.

We have evaluated your request carefully. Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes. In addition, we believe that honoring your request at this early stage of the Presidental campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time is, of course, a significant factor in our decision.

Insofar as the nomination process is now focused on political activities in individual states like Iowa, you may wish to contact stations serving those particular states.

Please be assured that NBC News will continue to cover important and newsworthy aspects of President Carter's political activities.

Very truly yours,

App. at 19.

[9] Carter-Mondale Presidential Committee, Inc., —— FCC2d —— (FCC 79-750, Nov. 21, 1979). App. at 114.

In dissent, Commissioner Lee argued that the Commission's decision prevented the networks from exercising "their

vember 26, 1979, how they intended to fulfill their obligation under the Act.[10]

The networks all sought reconsideration of the Commission's decision. Their reconsideration petitions were denied, however, and on November 28, 1979, the Commission issued a second Memorandum Opinion and Order (Order II)[11] clarifying its decision of the previous week. Order II set November 29, 1979 as the deadline by which the networks were required to file their plans for compliance with the statute.

On November 28, 1979, the networks petitioned this court for review of the FCC orders.[12] They also requested

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legitimate editorial judgment by rejecting the access request because of its prematurity." App. at 140. He concluded that, therefore, the decision was "a serious abuse of the Commission's discretion." *Id.* He later stated that he thought the majority's approach created "the appearance of government control over programming." *Id.* at 338.

Commissioner Washburn wrote in dissent that the majority opinion would stand for the proposition "that the candidate's own determination of his needs is overriding." App. at 142. The opinion represented "the FCC's interfering with the discretion of the broadcasters and substituting our judgment for theirs." *Id.* This, he later said, "destroy[ed] the delicate balance between assuring broadcasters' independence of journalistic discretion, affording increased opportunities for political discussion by candidates, and informing the electorate." *Id.* at 339.

[10] —— FCC 2d at ——; App. at 136.

[11] Carter-Mondale Presidential Committee, Inc., —— FCC 2d —— (FCC 79-773, Nov. 28, 1979). App. at 305.

[12] The National Association of Broadcasters intervened in support of the networks. One *amicus* brief was submitted by the Carter-Mondale Presidential Committee, Inc. in sup-

the court to stay the FCC orders pending such review, a request which we granted.

For reasons external to the campaign (primarily the perceived need to focus national attention on the plight of the American hostages in Iran), the Carter-Mondale Committee determined to postpone to early January the program it had planned to broadcast during the period December 4 to 7. It was still felt, however, that some time was needed in conjunction with the President's announcement of his candidacy. Accordingly, CMPC sought and subsequently obtained from CBS the purchase of five minutes of time on December 4. It also sought and obtained from ABC and NBC offers of time for a 30-minute program in early January, and the ABC offer was accepted. Throughout these negotiations CMPC, as well as the networks, reserved all rights relating to this appeal.

II. The Existence of an Affirmative Right of Access for Candidates Seeking Federal Elective Office

In the early days of this nation, political campaigns—even presidential campaigns—were relatively simple affairs. Campaigning took the form of speeches "from stump and pulpit, of debate in the highly partisan press, of private correspondence, and of persuasive activities on election day." [13] Near the close of the nineteenth cen-

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port of the FCC. Another *amicus* brief was submitted jointly by the National Citizens Committee for Broadcasting, the National Black Media Coalition, Americans for Democratic Action, the United Food & Commercial Workers International Union, Stewart Rawlings Mott, The Anderson for President Committee, James L. Buckley, the National Education Association, Rep. Albert Gore, Jr., Rep. Bill Frenzel, and Jerome Barron in support of the FCC.

[13] A. Heard, The Costs Of Democracy 401-06 (1960).

tury, however, as printing presses became more common and the price of paper decreased, the "era of campaign literature" began.[14] Radio was first used in the 1924 campaign: Calvin Coolidge spent $120,000 for radio time; his opponent, John W. Davis, spent $40,000.[15] By 1928, it was the most important campaign medium.[16] Television was a factor in the 1948 election: Republican rivals Harold E. Stassen and Thomas E. Dewey conducted a television debate before the Oregon primary. By the 1952 campaign, presidential candidates were spending millions of dollars on television.[17] Today, there can be no doubt that we are in the "era of television campaigning." [18] Indeed, since 95 percent of our people operate a television set for an average of over five hours a day,[19] and 60 percent of them rely primarily on television for news,[20] it would be hard to overestimate the importance of television to our political processes. It is undisputed that "[f]or presidential and senatorial candidates, the television is a necessity." [21]

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[14] Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 582 (1973).

[15] R. MacNeil, The People Machine 127 (1968).

[16] *Id.*

[17] *Id.* at 127-28.

[18] Wick, *The Federal Election Company Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 582 (1973).

[19] Twentieth Century Fund, Voters' Time, Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era 6 (1969).

[20] S. Michelson, The Election Mirror 25 (1972).

[21] Wick, *The Federal Election Company Act of 1971 and Political Broadcast Reform*, 22 De Paul Law Review 583 (1973).

Against this backdrop, Congress passed the Federal Election Campaign Act of 1971, including as one of its four Titles the Campaign Communications Reform Act (Title I). Title I contained three significant provisions: (1) the FCC was empowered to revoke a station's license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy;" [22] (2) during a specified period before a primary or general election, a broadcast station was not permitted to charge a legally qualified candidate for any public office a fee in excess of its "lowest unit charge. . . for the same class and amount of time for the same period;" [23] and, (3) in using the communications media, candidates for federal elective office were not permitted to exceed established spending limits.[24] The first of these provisions was codified as Section 312(a)(7) and is the basis of this litigation.

The networks argue that Section 312(a)(7) did not create a new right of access for federal candidates. They contend that the statute merely codified FCC policies developed prior to 1971 under the public interest standard. They cite as support for this proposition *dictum* from the Supreme Court decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*:

> In 1959, as noted earlier, Congress amended § 315(a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license

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[22] 47 U.S.C. § 312(a)(7) (1976).

[23] 47 U.S.C. § 315(b)(1) (1976).

[24] 47 U.S.C. § 801(1), *repealed* Pub. L. 93-443, title II, § 205(b), Oct. 15, 1974, 88 Stat. 1278 (1976).

> "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates.[25]

On the other hand, the Commission and *amici* argue that the plain meaning of the statutory language and the statute's legislative history indicate that Congress *did* create in Section 312(a)(7) a new right of access for federal candidates.

The question is whether Section 312(a)(7) creates a right in candidates for federal elective office to advocate their candidacies by direct broadcast communication to the electorate. Such a right is properly called an *affirmative* right of access. It exists regardless of the actions of the actions of the broadcaster. By contrast, a *contingent* right of access must be activated by some prior event.[26] Access achieved under the equal time provision of Section 315,[27] for example, is a contingent right of access. Our study of the plain language of Section 312(a)(7) and our review of the legislative history of the provision leads us to conclude that Section 312(a)(7) *did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office.

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[25] 412 U.S. 94, 113 n.12 (1972).

[26] B. SCHMIDT, JR., FREEDOM OF THE PRESS V. PUBLIC ACCESS 17 (1976).

[27] 47 U.S.C. § 315 (1976).

A. *The Plain Language of Section 312(a)(7)*

The plain language of Section 312(a)(7) authorizes the FCC to revoke a broadcaster's license

> for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by *a legally qualified candidate* for Federal elective office on behalf of *his* candidacy.[28]

The provision speaks in terms of individual candidates—"*a* legally qualified candidate" seeking time to advocate "*his* candidacy." By contrast, the Commission's policy before Section 312(a)(7) gave no attention to individual candidates. The Commission summarized its practice prior to the adoption of Section 312(a)(7) in its *Report and Order, Commission Policy in Enforcing Section 312(a)(7)*:

> Prior to the enactment of [Section 312(a)(7)], we recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community. No legally qualified candidate had, at that time, a specific right of access to a broadcasting station. However, stations were required to make reasonable, good faith judgments about the importance and interest of particular races. Based upon those judgments, licensees were to determine how much time should be made available for candidates in each race on either a paid or an unpaid basis. There was no requirement that such time be made available for specific "uses" of a broadcasting station to which Section 315 "equal opportunities" would be applicable.[29]

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[28] 47 U.S.C. § 312(a)(7) (1976) (emphasis added).

[29] Report and Order, Commission Policy in Enforcing Section 312(a)(7), 68 FCC 2d 1079 (1978).

The change of focus manifested in the language of Section 312(a)(7), especially when seen against this backdrop of previous Commission policy, indicates that Congress was doing something different in that provision and supports the view that the legislators were creating a new right for invidual candidates when they passed that provision.[30]

Additionally, it is noteworthy that Section 312(a)(7) establishes an access right for candidates for *federal* office. The public interest doctrine, to the extent it establishes a right of access at all, does so for *all* offices —federal, state, and local. If Section 312(a)(7) does no more than codify the requirements of the public interest doctrine, it is peculiar that its plain language limits it to *federal* elections.[31] This is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine.

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[30] In their briefs and at oral argument, the networks make much of the fact that Section 312(a)(7) was enacted in the context of "a long tradition of *not* affording rights of access in the first instance to *individual* speakers." CBS Brief at 20 (emphasis added). This observation underscores the importance of the fact that the language of Section 312(a)(7) focuses on the individual candidate. The plain language of Section 312(a)(7) clearly goes beyond FCC practice under the public interest doctrine.

[31] Nowhere in their briefs do the networks explain why Congress would have referred only to federal candidates if it were intent on codifying Commission practice with regard to all candidates. When asked at oral argument to explain why Congress would have limited Section 312(a)(7) to federal candidates if it were not creating a right of access that went beyond that available under the public interest doctrine, counsel for CBS had no explanation.

B. *The Legislative History of Section 312(a)(7)*

The legislative history of Section 312(a)(7) and of the statute in which it was passed provides support for the view that Section 312(a)(7) created an affirmative right of access for federal candidates. Section 312(a)(7) was enacted as part of Title I of the Federal Election Campaign Act of 1971. One of the primary purposes of Title I was "to give candidates for public office *greater access* to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." [32]

The supporters of the provision in the Senate saw it as a means of creating a new right of access. Senator Pastore, opening the hearings before the Senate Subcommittee on Communication concerning the Act, noted that increased access could be accomplished either by repeal

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[32] S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 1773, 1774 (emphasis added). *See also* S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1821; 117 Cong. Rec. 28792 (1971) (statement of Sen. Pastore).

The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to "emphasize" the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during preelection periods. S. Rep. No. 96, *supra*, at 34, *reprinted in* U.S. Code Cong. & Ad. News at 1781-82. However, it must be said that there is no specific explanation of the statutory language or statement of its intended impact in the Senate report.

of Section 315 or by mandating a scheme of access.[33] Senators Scott and Mathias, the co-sponsors of Section 312(a)(7), proposed the section as a means of granting access—especially to the nonincumbent candidate who needs it most.[34]

An amendment to the second sentence of Section 315 (a) which was adopted at the same time as Section 312(a)(7) lends further support to our reading of Congressional intent. Prior to 1971, the second sentence of Section 315 made clear that broadcasters were not common carriers as to an initial request by a political candidate but only as to responsive requests under the equal opportunities provision of the Section. When the Congress adopted Section 312(a)(7) in 1971, it amended the second sentence of Section 315(a) to read: "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." The conference reports state that the addition of the language "under this subsection" was a "conforming amendment" necessitated by the adoption of Section 312 (a)(7).[35] If Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no "conforming amendment" to Section 315 would have been required.

While not dispositive, subsequent events also lend credence to our reading of the statute. In 1973, the Senate reviewed the results of the 1972 campaign in light of the Federal Election Reform Act of 1971. The Committee also had under consideration new bills proposing the re-

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[33] Federal Election Campaign Act: Hearings on S.1, S.382, S.596, Before Subcomm. on Communications of Senate Comm. on Commerce, 92d Cong., 1st Sess. 152 (1971).

[34] *Id.* at 348.

[35] H. Conf. Rep. No. 92-752, 92d Cong., 1st Sess. 22 (1971); S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22 (1971).

peal of Section 315. Then FCC Chairman Dean Burch testified concerning, among other things, the Commission's experience with Section 312(a)(7).[36] He informed the Committee that the Commission had issued a statement setting forth its understanding that "Section 312 (a)(7) now imposes on the overall obligation to operate in the public interest the *additional specific requirement* that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office."[37] After explaining how the Commission was interpreting the statute, Chairman Burch stated: "[i]f we have erred in some important construction, we would, of course, welcome Congressional guidance."[38] Senator Pastore, the floor manager for the 1971 Act, responded that the Commission was going about the task well.[39] Two days later in these hearings, Dr. Frank Stanton, Vice Chairman of CBS, made a strong plea to the Committee for the repeal of Section 312(a)(7). Dr. Stanton stated:

> Section 312(a) now requires that on the pain of license revocation a broadcaster must make available to candidates for a federal elective office reasonable amounts of paid time or reasonable access to free time.[40]

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[36] Hearings Before the Communications Subcommittee of the Senate Committee on Commerce, 93rd Cong., 1st Sess., ser. 93-4 at 139 (1973).

[37] Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C. 2d 510, 537-38 (1972) (emphasis supplied).

[38] Hearings Before the Communications Subcommittee of the Senate Committee on Commerce, 93rd Cong., 1st Sess., ser. 93-4 at 137 (1973).

[39] *Id.*

[40] *Id.* at 190.

Dr. Stanton went even further by stating:

> Section 312 *grants rights to all legally qualified candidates for Federal office* and as the phrase "legally qualified" has been interpreted by the FCC it includes many a fringe candidate.[41]

Our study of the legislative history of Section 312(a)(7) causes us to agree that it requires a broadcaster to "make available to candidates for a federal elective office reasonable amounts of paid time."[42] To put it another way, our reading of the legislative history leads us to conclude that Section 312(a)(7) creates the right of affirmative access that the networks are contesting in these cases.

C. *The Relevance of CBS* v. *DNC*

The strongest support for the networks' contention that Section 312(a)(7) did *not* create a *new* right of access is *dictum* in the Supreme Court's opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee.*[43] In light of the plain language and statutory history of Section 312(a)(7), we find that *CBS* v. *DNC* is not controlling here. In *CBS* v. *DNC*, the Court was considering a decision by the FCC that neither the Communications Act nor the First Amendment *required* the agency to *force* broadcasters to accept paid editorial advertisements from citizens at large. The Court held that the agency was not *required* to establish such an affirmative right of access for all citizens. While treating this issue in a lengthy opinion, the Court, in a passage that was deferential to both Congress and the FCC, noted that the Commission had frequently ruled that no *private* in-

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[41] *Id.*

[42] *Id.*

[43] 412 U.S. 94 (1972).

dividual had a right of access, and that Congress had not reversed that policy.[44] Then it noted that Congress had not adopted a *general* right of access in spite of the fact that it had amended the Communications Act several times. It was in a footnote to this point that the Court alluded to Section 312(a)(7) as one of several amendments to the Act which had been adopted. The Court said in cursory fashion that Section 312(a)(7) "essentially" codified the prior standards of the Commission.[45] This *dictum* strayed far from what was before the Court, and it was uttered in a case quite different from those before us.

The Supreme Court in *CBS* v. *DNC* held that the First Amendment does not require that citizens at large be granted access to broadcasting facilities upon request. The "essentially codified" language indicates at most the Court's judgment that Section 312(a)(7) represents no departure from *one* principle embodied in the public interest standard—to wit, that one limited class of speakers, political candidates, has a stronger claim to the airwaves than do citizens at large. The Court's *dictum* is not a denial that Congress had enacted, in 1971, a very specific, obligatory right of access for federal candidates. In disallowing a potentially expansive system of access, the Court simply had no need to pass on whether Congress had adopted the much more limited affirmative right of access embodied in Section 312(a)(7).

It is noteworthy that, in the case before us, the deference to Congress and the Commission which the Court manifested in *CBS* v. *DNC*[46] cuts in favor of the existence of a limited right of access. Here, the Commis-

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[44] *Id.* at 112-13.

[45] *Id.* at 113-14 n.12.

[46] CBS v. DNC, 412 U.S. at 112-13; *see also id.* at 131.

sion uses a statutory provision to *support*, rather than resist, the imposition of a limited affirmative right of access.

D. *Summary of Section II*

At oral argument, counsel for ABC was asked whether he would accept the proposition that Section 312(a)(7) created *some* right of access on the part of federal candidates at *some* point in the campaign. He said that he would. On further questioning from the bench, he admitted that therefore the issue of candidate access before us could be reduced to two questions: (1) when does the right of access attach, and (2) how might we decide whether the treatment accorded a given request for access is reasonable.

We agree. Our study of the language and history of Section 312(a)(7) leads us to conclude that it did create an affirmative right of access for individual candidates for federal elective office. It is the implementation of that right of access by the FCC which must now be examined.

III. The Implementation by the FCC of the Affirmative Right of Access for Candidates Seeking Federal Elective Office

The networks challenge the implementation of Section 312(a)(7) by the Commission, arguing that the orders involved here are arbitrary, capricious, and contrary both to the statute and to prior FCC interpretations of the statute. They contend that in these cases the Commission improperly substituted its judgment for that of the broadcasters in deciding what access was reasonable.

The Commission responds that the orders are based upon reasonable standards, previously articulated. It contends that in these cases it assumed only a narrow overseer's role—that it focused primarily on whether the broadcasters had given full consideration to all the rele-

vant factors. It repudiates any attempt to substitute its judgment for that of the broadcasters. Rather, it claims that it confined itself to judging the objective reasonableness of the broadcasters' actions based upon their own explanations of the bases of their decisions.

The Commission's authority to interpret Section 312 (a) (7) is not in dispute. That authority derives from Section 303(r) of the Communications Act which provides that the Commission shall "make such rules and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act. . ." [47] It is the propriety of the Commission's implementation of the statute in these specific cases that is challenged by the networks.

In the eight years since Section 312(a) (7) became law, the Commission has developed its interpretation of the statute, usually on a case by case basis. Only occasionally has it issued general interpretative statements.[48]

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[47] 47 U.S.C. § 303(r) (1976).

[48] In 1978 the Commission issued a Notice of Inquiry which asked, *inter alia*, whether it should commence rulemaking proceedings in order to clarify licensee obligations under § 312(a) (7). 43 Fed. Reg. 12938 (March 28, 1978). Had it done so, many of the questions raised today may have been resolved. We understand its decision not to do so, however, in light of th strong opposition by petitioners and others to such proceedings. Petitioner CBS, in fact, went so far as to challege the legality of FCC rulemaking on the grounds that it would "constitute an unwarranted governmental intrusion upon content and scheduling judgments of broadcasters." Report and Order: Commission Policy in Enforcing Section 312(a) (7) of the Communications Act, 68 FCC 2d 1079, 1080 (1978). In responding to meritorious Commission initiative by raising such concerns, petitioners have, at the very least, not eased the FCC's burden in interpreting and implementing § 312(a) (7).

The 1978 *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*[49] is by far its most thorough statement to date. While this generally *ad hoc* approach is not ideal, we cannot say that during the process the Commission has been "indifferent to the rule of law,"[50] as the petitioners contend. Varying applications of Section 312(a)(7) have occurred, but only where varying factual contexts have required it. New developments in the agency's interpretation of the statute have surfaced, but never without good cause, adequately explained. We are satisfied that the Commission's orders in this case are within the agency's statutory authority and do not represent an abuse of discretion.

A. *Determining When the Campaign Has Begun*

The networks claim a right to refuse to sell time to candidates "too early" in the campaign. In the instant case, they contend that the Carter-Mondale Presidential Committee was requesting too much time, too soon in the race. They argue that the national political conventions and the general election were too far away to justify the airtime sought by CMPC.

The Commission counters that the question of when the obligations imposed by Section 312(a)(7) attach is a threshold question which has "an inherently . . . objective character."[51] It argues that neither broadcasters nor candidates "bring a perspective of total objectivity as to questions of the initial applicability of Section 312(a)

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[49] 68 FCC 2d 1079 (1978).

[50] Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (1971).

[51] Carter-Mondale Presidential Committee, Inc., —— FCC 2d ——, —— (FCC #79-773, November 28, 1979) (*Order* II). App. at 315.

(7)." [52] It concludes, therefore, that it is the FCC's statutory obligation "to make a determination on this threshold issue . . . based on [an] independent evaluation of the status of the campaign, taking into account the position of the candidate and the networks as well as other factors." [53]

In this case, the agency looked to a variety of "objective indicia" in determining that the campaign had begun. Among the factors considered were: announcements of candidacy, the establishment of national campaign organizations, fund raising activities, endorsements, media coverage, and the progress of the delegate selection process.[54] "In this context," the Commission stated, "the only reasonable conclusion to be drawn is that the campaign is in full swing now." [55]

It is noteworthy that the networks do not challenge the reasonableness of the indicia used by the FCC in reaching its conclusion. Nor do they challenge the reasonableness of the conclusion itself. They argue only that the agency ought not address the question at all.

The networks argue that the FCC's decision to treat "the question of when" as one to be answered by the Commission "cannot be reconciled with" its prior statements on the issue.[56] It is true that, prior to the orders now under review, the Commission's pronouncements on this point have lacked the clarity that facilitates review. Still,

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[52] *Id.*

[53] —— FCC 2d at ——. App. at 314.

[54] Carter-Mondale Presidential Committee, Inc., —— FCC 2d ——, —— (FCC #79-750, November 21, 1979) (*Order* I). App. at 129-31.

[55] —— FCC 2d at ——. App. at 131.

[56] CBS Brief at 29.

we are unable to conclude that the present orders "cannot be reconciled with" these earlier renditions of the Commission's position. The 1978 *Report and Order*, the only statement by the Commission which addressed the issue in a meaningful way, seems to have assumed that the "question of when" was addressed to the FCC. Therein, the Commission declined to place any uniform limits on the period during which Section 312(a)(7) applied "because each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates." [57] Determining to proceed on a case-by-case basis, the Commission specifically foresaw the possibility that "a presidential campaign may be in full swing almost a year before an election. . . ." [58] The key fact is that the Commission *declined* to define uniform limits. It did not foreswear the power to do so; indeed, it affirmed the power to decide on a case by case basis when campaigns had begun.[59]

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[57] Report and Order: Commission Policy on Enforcing Section 312(a)(7), 68 F.C.C. 2d 1079, 1091 (1978).

[58] *Id.*

[59] Although the networks cite *dictum* in one decision of the Commission, Anthony R. Martin-Trigona, 66 F.C.C. 2d 968, 969 (1977) (holding that Martin-Trigona was not a "legally qualified candidate"), to support their position, they have failed to direct us to a single case where either the Commission or the Broadcast Bureau *directly considered* the question at hand and decided it in a way which "cannot be reconciled with" the FCC's position in this case. Indeed, in the second Anthony R. Martin-Trigona case, 67 F.C.C. 2d 743 (1978), the Commission said that, in addressing this question, "the licensee, and *ultimately the Commission* must look to the circumstances of each particular case to determine when it

ABC argues that if the FCC undertakes the task of deciding when a campaign has begun in order to enforce Section 312(a)(7), the agency will be impermissibly involved in the election process. This would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it has *already begun.* As described in the orders under review, the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process.[60] There is nothing offensive about such a system.[61]

Finally, all three networks argue that permitting the FCC to decide the "question of when" would violate their First Amendment rights. Though we reserve discussion of most of the constitutional arguments raised by the net-

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is reasonable for a candidate's access to begin. . . ." 67 F.C.C. 2d at 746 n.4.

We cannot find that the Commission was "indifferent to the rule of law" and its past precedents in deciding independently to determine the date upon which access rights accrue to federal candidates. Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C.Cir. 1971).

[60] As Commissioner Brown noted in his separate statement on reconsideration: "The Commission did not create this factual situation, but neither we nor the networks can ignore it." *Order* II. —— FCC 2d ——, —— (1979). App. at 330.

[61] ABC insists that a result of the Commission's ruling is that the candidate's needs or desires will govern when the broadcaster must begin selling time in a campaign. *See, e.g.,* ABC Brief at 18, 26, 30, 36, 43-46, 50. But the Commission held that the "candidates needs" is one of the considerations to be weighed by the broadcaster *after* a threshold determination has been made that the campaign is under way and the obligations imposed by Section 312(a)(7) have attached. *See Order* II, —— FCC 2d ——, —— (1979). App. at 321-24. The "candidate's needs" play no role in determining whether Section 312(a)(7) obligations have attached.

works for a later section of this opinion,[62] we treat this one here. Simply put, not all aspects of the broadcasting business enjoy constitutional protection.[63] It is the editorial process that is protected—and, as the Supreme Court has explained, "editing is the selection and choice of material." [64] A determination of when statutory obligations attach is not an editorial decision. More specifically, deciding whether a campaign has begun for the purposes of Section 312(a)(7) involves no choice of material; it is purely a legal judgment. And, "a legal judgment by a licensee . . . cannot be legally binding on the FCC or this court . . ." [65] Therefore, there is no constitutional objection to a determination by the Commission defining the point during a campaign when the obligations of Section 312(a)(7) attach.

The networks ignore the fact that by raising "the question of when" the Commission has narrowed the scope of the statute and has limited its impact on broadcasters. On its face, the statute applies to "a legally qualified candidate for Federal elective office." It might be read as

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[62] *See* Section IV *infra*.

[63] The business and commercial aspects of journalism, for example, are not immunized from regulation by first amendment considerations. *See*, Citizen Publishing Co. v. U.S., 394 U.S. 143, 155-56 (1951) (no immunity from antitrust laws); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act held applicable to news-gathering organization). Nor may a news reporter refuse to testify before a grand jury, even as to information acquired through reporting activities. Branzburg v. Hayes, 408 U.S. 665 (1972).

[64] CBS v. DNC, 412 U.S. 94, 124 (1973).

[65] National Broadcasting Co. v. FCC, 516 F.2d 1101, 1173 (Bazelon, C.J., dissenting from the order vacating the previous order granting rehearing *en banc*).

vesting rights in the individual candidate at such time as he becomes legally qualified—without regard to the stage of the campaign. By confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters.[66]

In summary, the Commission was justified in pronouncing its right to decide when in the campaign the access rights granted to candidates by Section 312(a)(7) attach. This determination is an objective, non-editorial judgment for which the Commission is better suited than either broadcasters or candidates. The Commission was also justified in opting for a campaign-by-campaign approach to the question rather than for a uniform rule. The indicia adduced by the FCC for this campaign-by-campaign analysis are reasonable, and they were reasonably applied in this case. The Commission's actions in this regard comported with prior FCC rulings and are constitutionally acceptable.

B. *Determining Whether Reasonable Access Has Been Granted*

Once the threshold determination that a campaign has begun is made by the Commission, it remains for someone to decide whether reasonable access has been granted to specific requesting candidates. The networks argue that the Commission has created a system of inconsistent standards which vitiates broadcaster discretion by overvaluing the candidate's desires. The Commission responds that it has articulated reasonable standards which value both "broadcaster discretion and broadcaster ac-

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[66] *Cf.* American Security Council Education Foundation v. FCC, —— F.2d —— (No. 77-1443, D.C. Cir., June 29, 1979), *petition for cert. filed.*

countability,"[67] and it contends that these standards have been consistent over time.

Before we discuss the merits of these claims, we must consider one significant prefatory issue. From the language of Section 312(a)(7), it is not obvious whether, once the campaign has begun, the reasonableness of the access provided a candidate is to be measured from the perspective of the requestor or from that of the grantor (the broadcaster). The CMPC argues the case as if the standard were whether a reasonable *request* has been made.[68] It is clear that the networks perceive their obligation—insofar as they perceive that they have one at all—as an obligation to make a reasonable *offer*. To the extent it faces this problem directly, the Commission requires that the *offer* of access be reasonable—with due consideration of the particular needs of the candidate.[69] This position is consistent with the Commission's 1978 *Report and Order*.[70] As between the two possible readings of the statute, this latter view better reflects the legislative history.

We now turn to our discussion of the standards employed to determine whether reasonable access has been granted in specific cases.

(1) *The Type of Review Conducted by the Commission in Examining a Broadcaster's Decision.* All parties to this litigation pay lip-service to the concept of broadcaster discretion. The issue is: to what extent *is* deference paid to the editorial rights of the broadcasters by

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[67] *Order* II, —— FCC 2d ——, —— (1979). App. at 321.

[68] CMPC Brief at 32-34.

[69] Order I, —— FCC 2d ——, —— and n.16 (1979). App. at 126-27.

[70] Report and Order, Commission Policy on Enforcing Section 312(a)(7), 68 FCC 2d 1079 (1978).

the Commission's definition of "reasonable access?" The broadcasters say their discretion is effectively eliminated. The FCC says it preserves broadcaster discretion while seeking only broadcaster accountability. We find that the agency has succeeded in its delicate task by confining itself to a review of two questions: (1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards? Discretion remains with the broadcaster, but *not* discretion to act without reasonable regard to the standards.

The Commission describes the type of review it has employed for access cases as forcing the networks to take a "hard look," [71] and it cites *Greater Boston Television Corp.* v. *FCC* [72] and *Citizens to Preserve Overton Park, Inc.* v. *Volpe.*[73] Often the "hard look" metaphor is used to mask a content-less test, however. Here, we take the Commission to be saying that it will insist that broadcasters consider and address all non-frivolous matters in responding to a candidate's request for time. We approve this approach.

We hasten, however, to note the restraints upon the reviewing tribunal that are inherent in this type of review. As Justice Harlan observed in applying the concept to reviewing *courts*:

> The court's responsibility is not to supplant [a] Commission's balance of . . . competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned

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[71] *Order* I, —— FCC 2d ——, —— (1979). App. at 126.

[72] 444 F.2d 841, 851 (1971), *cert. denied*, 406 U.S. 950 (1972).

[73] 401 U.S. 402, 416 (1971).

> consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purpose for which, it has chosen to act. . . .[74]

The Commission was correct in concluding that it should confine its role to "judging the objective reasonableness of the licensee's determination"[75] and that it must avoid making its own subjective judgments or substituting its judgment for that of the broadcaster.

The Commission has required that broadcasters file, "in response to a complaint, a full explanation of a broadcaster's decision." A statement of reasons is indispensable to meaningful review. If the Commission is to limit its role in determining whether the broadcaster has considered and addressed all non-frivolous matters in processing an access request, such a requirement is not only proper but also necessary.

(2) *The Standards to Which a Broadcaster Should Advert in Deciding Whether to Grant a Specific Request for Access.* The networks claim that the standards applied by the Commission in these cases are vague, inconsistent with previous FCC statements concerning the relevant standards, and unduly considerate of the candidate's desires. The Commission contends that the standards it has proferred have been articulated clearly and consistently in recent years, and it avers that they strike the proper balance between the statutory goal of access

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[74] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). *See also* Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (1969).

[75] Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (1976).

for candidates and the needs of broadcast journalists. After reviewing the standards advanced by the FCC in these cases and in its earlier statements on this subject (especially the 1978 *Report and Order*),[76] we conclude that the Commission has articulated reasonable standards to guide broadcasters in determining whether to grant specific requests for access. In addition, though the Commission's thinking clearly has been evolving, we find no fundamental inconsistency between its earlier statements and its action in these cases.

In its 1978 *Report and Order*, the FCC declined to adopt formalized rules to implement Section 312(a)(7) because "there are no [such] rules which would encompass all the various circumstances possible during an election campaign."[77] However, it did note and discuss "areas . . . where some guidelines would be appropriate to clear up confusion expressed by candidates and licensees and to ensure that the Congressional intent in enacting Section 312(a) is fully realized."[78]

According to the FCC, some appropriate considerations are: (a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request.

In its 1978 statement, the Commission stressed that the *individual* needs of the candidate making the request for access deserved special weight. It indicated a belief

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[76] Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C. 2d 1079 (1978).

[77] *Id.* at 1089.

[78] *Id.*

> that Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access.[79]

It went further:

> A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee.[80]

The Commission noted that it would be particularly unreasonable for a broadcaster to

> follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers. We feel certain that Congress in granting Federal candidates a specific right of access to a station wished such candidates to be at least on par with commercial advertisers who have no such access rights. . . .[81]

Indeed, it flatly proscribed such across-the-board bans.[82]

In its first order in the cases at hand, the Commission noted that it placed "particular emphasis" on the candidate's needs. But it pointed out that

> [i]n taking this factor into account, the licensee . . . does retain some discretion to evaluate the reason-

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[79] *Id.* at 1089 n.14 (1978).

[80] *Id.* at 1090.

[81] *Id.*

[82] *Id.* at 1094.

> ableness of [the candidate's] assessment [of his needs] in the broad sense and to weigh that factor against other factors which we have said are relevant.[83]

In its second order, the agency explained even more fully "how the specific nature or purpose of a particular candidate's request should be weighed." [84] The Commission indicated that the broadcaster was not to evaluate the candidate's needs insofar as they involve the candidate's subjective, personal or immediate political desires. Nor should the broadcaster second-guess the political wisdom of the candidate's request.[85] Instead, in evaluating the candidate's needs, the broadcaster was to act in a manner that was responsive to the candidate's request.

> In this overall weighing process, we nevertheless believe that a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime. For example, a candidate might request an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests. In our view Section 312 (a) (7)'s goal of encouraging electorate-informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request.[86]

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[83] *Order* I, —— FCC 2d ——, —— (1979). App. at 126.

[84] *Order* II, —— FCC 2d ——, —— (1979).

[85] *Id.* at ——. App. at 315-21.

[86] *Id.* at ——, App. at 317.

Thus, consideration of the candidate's needs should manifest itself in "a specific—rather than blanket—response to individual requests [which affords] greater assurance . . . that [the] candidate's interests cannot be ignored in the balancing process." [87]

The individual need of the candidate is only the first consideration advanced by the Commission to guide broadcasters in determining whether to grant a specific request for access. A second consideration is the amount of time previously provided to the candidate. Clearly, as the amount of time *already provided* to a candidate increases, the strength of his request for additional time decreases. This consideration merely reflects the fact that inherent in the term "reasonable access" is the notion that the broadcaster may place some limits on the amount of time it will make available to any single candidate. It follows that whatever the broadcaster's obligation to provide access to a candidate, the obligation will be greater if the candidate has not previously been provided time.

In this respect, the networks have misinterpreted the Commission's statements regarding the weight to be accorded a candidate's first request. The networks argue that the FCC gives so much weight to the first request of a candidate that a first request cannot be denied. At oral argument, counsel for FCC protested that nothing in the Commission's decisions requires that first requests be granted automatically. He continued that the Commission merely noted that, as the *first* request, it could not be denied on the basis that the candidate had already obtained a reasonable amount of time to satisfy the statute.[88] We read the orders under review to say ex-

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[87] *Id.* at ——. App. at 322.

[88] *Id.* at ——. App. at 316. *See also* Separate Statement of Commissioner Brown, — —FCC 2d at ——. App. at 332.

actly that. The decisions allow the broadcaster leeway to demonstrate that the amount of time requested cannot be granted because of the likelihood of subsequent requests or that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that other candidates will request time.[89] Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible.

The third consideration advanced by the FCC to guide broadcasters in granting or denying access requests is the potential disruption of the broadcaster's regular programming. The simple fact that a broadcaster would have to make some changes in his program schedule is not a sufficient basis for denying a request unless those changes would amount to a "substantial" disruptive impact. Congress envisioned a system where federal candidates would have access—presumably by displacing some regular programming. Only substantial disruption of a broadcaster's regular programming is entitled to weight in the balancing process.

The danger of disruption is greatest, of course, in the closing days of a campaign when most, if not all, candidates will desire air time. The farther away one moves from election day, the more diluted the impact of mandatory political "uses." Thus, the Commission has indicated that the danger of disruption will be weighted more heavily *later* in the campaign.[90]

Section 312(a)(7) operates against the background of the equal time requirements of Section 315.[91] The fourth consideration that broadcasters may weigh in addressing a candidate's request for time is the number of other candidates likely to invoke equal opportunity rights if

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[89] *Id.* at ——. App. at 317.

[90] *Order* I, —— FCC 2d —— ,—— (1979). App. at 133.

[91] 47 U.S.C. § 315 (1976).

the broadcaster grants the request before him. At a given point, the potential disruption might justify denying or, more likely, limiting a request for time. More often, a likelihood of a large number of equal time requests might justify modification of requirements concomitant to the access right. For example, in its 1978 *Report and Order*, the FCC said:

> We are aware that there may be situations where the number of Federal candidates in a particular election may make it impossible for a station to make prime-time program-time available. We have never held that the "prime-time, program-time" policy is absolute and inflexible. We will continue to make exceptions to this policy where circumstances dictate.[92]

The fifth consideration offered by the FCC to guide broadcasters faced with requests for access is the timing of the request itself. This is separate from the question of when obligations under Section 312(a)(7) attach. Here the issue is whether the candidate has given the broadcaster reasonable notice that he desires to purchase time—notice sufficient to permit the broadcaster to make the adjustments in its schedule that may be required. If a request is made months in advance, denying it is more unreasonable than it would be if it is made only days before the proposed broadcast.

Finally, the Commission has articulated an overarching consideration to which broadcasters must attend in considering a candidate's request for time. The broadcaster must articulate with clarity the basis for his decision. He must address the five considerations just outlined when they are relevant, and he must treat any others that might bear on the individual case.[93]

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[92] Commission Policy in Enforcing Section 312(a)(7) of the Communications Act 68 F.C.C. 2d 1079, 1090 (1978).

[93] *See* Section IIIB(1) *supra*.

C. *Applying the Standards to the Cases at Hand*

We must now consider whether the record in these cases adequately supports the Commission's conclusion that the networks failed to apply the proper standards. We hold that it does.

NBC and ABC refused to sell the Carter-Mondale Presidential Committee *any* time in December, saying it was too early in the campaign. The networks have not contested the reasonableness of the Commission's finding that the campaign was in full swing. Instead, they argued that as a legal matter the Commission did not have the power to make that finding. However, we have affirmed the FCC's authority to make that decision.[94] It follows that the Commission was correct in finding that NBC and ABC had failed to apply the proper standards in responding to CMPC's request for time.[95]

The networks—in this regard, all three networks—displayed unreasonable disregard for the relevant standards in a second way, however. NBC and ABC, by deciding that it was too early to sell time to *any* candidate, had settled on what amounted to an across-the-board ban on candidate access. CBS, for its part, had in September adopted a policy of selling two five-minute spots to candidates who requested time in 1979.[96] While the CBS policy did not represent a total ban, it was also an across-the-board policy. Such across-the-board policies violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster had to tailor his response to the

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[94] *See* Section IIIA *supra.*

[95] *See Order* I, —— FCC 2d ——, —— (1979). App. at 134.

[96] *Id.* at ——. App. at 135.

individual candidate.[97] Across-the-board policies inherently fail to address this standard. Thus the Commission found that NBC's absolute refusal to sell any time was precisely "the type of 'arbitrary blanket ban' that was deemed to be unreasonable in our July 1978 *Report and Order*." [98] And, it concluded with respect to ABC's and CBS's sales policies:

> ABC appears to have adopted a *blanket policy* of refusing to sell time to presidential candidates until January 1980 which, in view of our determination about the state of the campaign is unreasonable.[99]

and,

> We cannot find that these reasons [advanced by CBS] are sufficient to justify a *blanket refusal* to

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[97] *See* Section IV B(2) *supra.*

[98] CBS states that "if the circumstances of the individual candidate were required to be considered . . . it would have been reasonable for CBS to make a limited offer of program time at this point, in light of the fact that President Carter enjoys unparalleled access to the media." CBS Brief at 38. ABC makes a similar argument, ABC Brief at 55, and NBC refers to the argument in a footnote, NBC Brief at 43. These arguments ignore the plain meaning of the statute and the Commission's interpretation of that language as articulated in Penny Manes, 42 FCC 2d 878 (1973). The statute makes clear that the obligation to afford "reasonable access" can be satisfied only through the sale or gift of "use[s]" of the station and that coverage of the candidate in news programming is not sufficient. Moreover, as early as 1973, the Commission stated that "Section 312(a)(7) relates to 'use' of a licensee's facilities by the candidate, not to a licensee's coverage of a candidate's campaign in news or public affairs programming." Penny Manes, 42 FCC 2d 878 at 882-83.

[99] *Order* II, —— FCC 2d ——, —— (1979). App. at 323 (emphasis supplied).

> sell the time; nor can we find that these reasons are sufficient to justify CBS' policy of limiting its sales to candidates to five minute segments.[100]

In particular, the across-the-board policies of all three networks failed to address the needs of CMPC as stated by it—to wit, for a 30-minute block of time to present a comprehensive statement that would "kick off" the campaign in the thought-to-be crucial days of early December. The FCC did not prejudge that 30 minutes was the only reasonably responsive offer the networks could make. But it was clear 0 minutes, or 5 minutes, would not do—especially when those offers were the result of an across-the-board policy. It correctly concluded that, given their proposals, the networks could not have taken the requisite "hard look" at the relevant factors—here, especially the first factor, the specific needs of the candidate. Therefore, the Commission correctly concluded that the networks had unreasonably failed to grant access as required by Section 312(a)(7).

D. *Conclusion to Section III*

In these cases, the Commission's view might be summarized as follows: the interests of broadcasters and candidates must be balanced in determining what consittutes reasonable access; the broadcaster must be responsive to each individual request by a candidate and may not adopt across-the-board policies; the broadcaster must provide a full explanation of the basis of his decision in responding to a request, giving full consideration to all relevant factors; and in the final analysis the Commission's role is to judge the objective reasonableness of the broadcaster's action based on the broadcaster's own explanation of the basis for his decision. In essence, the

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[100] *Order* I, —— FCC 2d ——, —— (1979). App. at 134-35 (emphasis supplied).

Commission determines, based upon the record adduced by the broadcaster, whether or not the broadcaster has considered and addressed all non-frivolous matters.

Stated as it is summarized in the preceding paragraph, the Commission's position is eminently reasonable. But the actions of the agency in these cases were not flawless. If an agency intends to demand that regulated companies consider and address all relevant factors, it must be clear and consistent in articulating those factors. Here, although the source for each of the standards pressed by the Commission can be seen with hindsight, the agency failed to headline its policy as clearly as it might have.

On the other hand, it must be said that during the course of these cases, the FCC gave the networks every opportunity to explain and justify their decisions. The Commission examined the networks' claims with care and deference, and it articulated the reasons and rationale for its actions with clarity. Moreover, the standards employed in the orders under review here represent a very reasonable effort at implementing Section 312(a)(7). The Commission's orders satisfy the requirements for reasoned decision-making set forth by this Circuit in *Greater Boston Television Corp.* v. *FCC*.[101]

IV. The Constitutionality of Section 312(a)(7) as Implemented

The networks argue that Section 312(a)(7) violates the First Amendment because it impinges upon their editorial discretion, injecting the government into the decisional processes of broadcasting.[102] They cite *Miami*

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[101] 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971).

[102] At the outset, a tension in the overall argument of the networks is worth noting. On the one hand, they concede that the Congress and the FCC can require, and have required,

Herald Publishing Co. v. *Tornillo*[103] for the proposition that a compulsory access requirement for political candidates would violate the First Amendment if it were applied to the *print* media. They argue that no decision of the Supreme Court has recognized an affirmative right of access to the broadcast media for any individual or group. The Court, the networks contend, has approved mandatory access schemes only where a broadcaster has triggered rights of reply by a specific programming decision—a contingent right of access, so-called.[104] They point to the Court's decisions in *CBS* v. *DNC*[105] and *FCC* v. *Midwest Video*[106] as indicating the unwillingness of the Supreme Court to authorize any affirmative right of access.

The network's reliance on *CBS* v. *DNC* and *Midwest Video* is misplaced. In *CBS* v. *DNC* the Court found that nothing in the language of the Communications Act *compelled* a conclusion different from that reached by the FCC, to wit, that the Commission *need not require* broad-

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broadcasters to grant access to political candidates *as a group* under the rubric of the public interest doctrine. Indeed, they cite the *dictum* in CBS v. DNC, 412 U.S. at 113-14 n.12 (1972), to show that the language of Section 312(a)(7) is nothing more than a codification of the public interest rule. On the other hand, they argue that the imposition of a burden of granting access to individual candidates for federal office is an impermissible interference with their editorial privileges. This seems disingenuous. The interference with editorial discretion seems no more or less under either approach.

[103] 418 U.S. 241 (1974).

[104] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 397 (1969).

[105] 412 U.S. 94 (1972).

[106] 99 S. Ct. 1435 (1979).

casters to accept paid political ads. The Court did not address the issue of whether it would be constitutional for the Commission to grant an affirmative right of access in broadcasting—even for the general public. It certainly did not reach the constitutionality of the rather limited and qualified rights of access made available to federal candidates only by Section 312(a)(7). In *Midwest Video*, the Supreme Court's decision turned entirely on statutory, not constitutional, grounds.[107]

It is true that the Eighth Circuit's decision in that case[108] did suggest that a *general* affirmative access requirement would be unconstitutional in *cable* television. But we are not reviewing an attempt by Congress or the FCC to create a general affirmative right of access —either in cable television or on the VHF channels. Rather, we confront a statutory provision creating a limited affirmative right of access in candidates for federal elective office—a provision which has been implemented in a concrete way by the FCC. Moreover, cable television is very different from VHF commercial broadcasting of the type involved here. For example, the

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[107] The Supreme Court reserved consideration of the constitutionality of a generally available affirmative right of access to cable television. 99 S. Ct. at 1446 n.19.

The heavy reliance of the networks on the *dictum* in CBS v. DNC regarding Section 312(a)(7) is plainly inconsistent with their arguments regarding the constitutionality of the FCC's attempt to impose a generally available affirmative right to access to cable television. It may be that the FCC's effort in that regard was unconstitutional—we do not as yet have a Supreme Court pronouncement on it. But the FCC's regulations for cable television were cited approvingly in *dictum* appearing as text (as opposed to *dictum* in a footnote) in CBS v. DNC, 412 U.S. 94, 313-32 (1972).

[108] 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd*, 99 S. Ct. 1435 (1979).

"scarcity" rationale used to justify FCC regulation in the first place has much less force with regard to cable television than with regard to VHF commercial broadcasting.[109] It is the constitutionality of *this* statute *as implemented* which we must consider.

The Supreme Court's opinion in *CBS* v. *DNC* provides support for the limited affirmative right of access at issue here. In that case, the Court reiterated the teaching of earlier cases that the broadcaster's editorial rights were less important than the rights of viewers and listeners.

> [W]e have held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency. . . . Although the broadcaster is not without protection under the First Amendment, "[i]t is the right of the views and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. . . ." [110]

It is worth noting that the limited affirmative right of access at issue here is vested in candidates for federal office. The public's right to be informed is nowhere stronger than in the area of elections. And, no speech is more protected than political speech.[111] Furthermore, in television we deal with a medium devoted exclusively to communication—and one which, by all accounts, is *the* medium of communication for most of our society. It is difficult to contend that the limited appropriation by

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[109] *See* Brandywine-Main Line Radio, Inc. v. Federal Communications Commission, 473 F.2d 16, 75-76 (1972) (Bazelon, Chief Judge, dissenting).

[110] 412 U.S. at 102 (1972) (citations omitted).

[111] *See* Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105 (1979).

government of part of the available spectrum for use in informing the electorate is constitutionally unacceptable.

As implemented by the Commission, Section 312(a)(7) provides such a right of affirmative access to a narrowly defined class of citizens. It authorizes access only for political "uses." And, the FCC has developed a procedure which affords leeway to the broadcaster's discretion: (1) the Commission confines its review to a consideration of the reasonableness of the broadcaster's explanation of his basis for refusing requested time, and (2) the reasonableness of the broadcaster's explanation is judged solely by whether he has duly regarded articulated standards.[112] The agency further limits the impact of Section 312(a)(7) on the broadcaster by limiting its applicability to the "political season" as objectively defined by the Commission.[113] This kind of limited allocation of the airwaves does not constitute an unwarranted incursion on editorial rights.

It is settled doctrine[114] that the government retains the power to decide how and to whom to allocate the air waves.[115] The right of "use" granted to the candidate

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[112] *See* Section IIIB *supra.*

[113] *See* Section IIIA *supra.*

[114] Elsewhere this writer has questioned the validity of the "scarcity" rationale as a justification for regulation of the broadcast media. *See, e.g.*, Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 Duke Law Journal 213, 223 (1975). It must be said, however, that the "scarcity" rationale is most valid when applied to VHF television. *Id.* And, these comments notwithstanding, it cannot be doubted that the power of the government to allocate radio and television frequencies has been upheld. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[115] *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 390-91 (1969) (the First Amendment confers no right on licensees

under Section 312(a)(7) does not confer on the candidate any right to interfere with what the broadcast journalist says or does on the air. Similarly, the broadcast journalist may not determine what the candidate says or does with the limited amount of air time available to him. Therefore, Section 312(a)(7) represents only a congressional re-allocation of the "use" of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired.[116]

The agency has defined its role and the rights of the candidates in such a way as to minimize the imposition on broadcasters. As implemented, Section 312(a)(7) is a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters.[117]

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to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use).

[116] The government practice involved here is analogous to reasonable time, place, and manner restrictions. Such restrictions have long been recognized as constitutionally acceptable. *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98 (1972); cf. Cox v. Louisiana, 379 U.S. 536, 554 (1965); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v. State, 308 U.S. 147, 160 (1939).

[117] The majority shares the first amendment concerns expressed by Judge Tamm, and welcomes the admonition regarding agency conduct that is embodied in his concurring opinion.

V. The Application of Section 312(a)(7) to the Networks

The networks argue that by its terms Section 312(a)(7) applies only to licensees—the Commission may revoke a "station license or construction permit." Thus, they say, the Commission erred in applying the mandate of Section 312(a)(7) to the networks.

The Commission construes Section 312(a)(7) as including two severable elements—one establishing a reasonable access obligation and the other a specific remedy. It contends that the obligation element is articulated in a way that does not expressly identify the entities subject to the obligation. The obligation is "to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station. . . ." Given the purpose of the statute, the FCC argues, it is reasonable to read Section 312(a)(7) as imposing an obligation to provide access not just upon individual stations but upon those who, by practice and contractual relationship, control the best practical means of efficiently acquiring national access—to wit, the networks.

When Congress created an explicit access obligation in Section 312(a) and amended Section 315(a) to reinforce the existence of such an obligation, it did so "to give candidates for public office *greater* access to the media so that they may *better* explain their stand on the issues and thereby *more fully and competely* inform the voters." [118] Plainly, Congress wanted to *enhance* the ability of candidates for federal office to communicate with the electorate. At the time, it already was established practice for networks to grant political time to presidential candidates seeking a national audience. Given its objective of expanding candidates' access to the

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[118] *See* note 32 *supra*.

people, Congress could hardly have intended to omit the most important channel of communication available to candidates.[119] The access right accorded to presidential candidates by Section 312(a)(7) would have been robbed of much of its intended significance if the candidate were forced to go from station to station around the country assembling his own network. The time, expense, and coordination difficulties of such an endeavor would deter many candidates, and would be impossible for others.[120]

The discussion in Congress surrounding the enactment of Section 312(a)(7) reveals that the legislators voting on the bill used the terms "broadcasting station," "broadcaster," "license," and "network" interchangeably.[121]

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[119] One aspect of the Commission's interpretation of networks-licensee obligations is worth noting here. Affiliates are likely to receive access demands in addition to those resulting from network offers of political programming. For example, presidential candidates seeking time on individual stations during local primaries, congressional candidates, and candidates for state and local offices may make requests to affiliates. The Commission recognized that "some individual affiliates might reasonably decline" to carry a political broadcast supplied by the network because of such special factors. App. at 314. Such flexibility is both necessary and laudable.

[120] The practical consequence of network immunity from Section 312(a)(7) would be most extreme in the final days of a general presidential election. Candidates would be forced to canvas the country for stations willing to broadcast last minute appeals to the voters. Congress could not have intended such a practical bar to televised communications between presidential candidates and the national electorate on the eve of an election.

[121] *See, e.g.*, 116 Cong. Rec. R. 5717, 5719 (1970) (remarks of Sen. Pastore), 5724 (remarks of Sen. Baker), 5732 (remarks of Sen. Yarborough), 5637 (remarks of Sen. Cotton), 8056 (remarks of Rep. Martin), 8057 (remarks of

Indeed, when presenting the Conference Report to the Senate, Senator Pastore, the bill's sponsor, referred to networks and individual broadcasters interchangeably.[122] Thus, there is support in the legislative history for the contention that Congress intended Section 312(a)(7) to apply to the networks.

Even if Section 312(a)(7) by itself does not afford the Commission power to mandate reasonable network access, such jurisdiction is "reasonably ancillary" to the effective enforcement of the individual licensee's Section 312(a)(7) obligations and, hence, within the Commission's statutory authority.[123] The Communications Act gives broad authority to the Commission to regulate all "interstate and foreign communication by wire, or radio," [124] and defines these communications as

> the transmission of . . . signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.[125]

Other substantive provisions of the Act dictate that the Commission is "to make special regulations applicable

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Rep. MacDonald), 8069 (remarks of Rep. Springer), 8071-72 (remarks of Rep. Broyhill), 8074 (remarks of Rep. Tiernan), 8075 (remarks of Rep. Vanik), 8078 (remarks of Rep. Murphy), 8082 (remarks of Rep. Springer), and 8083 (remarks of Rep. Eckhardt).

[122] 117 Cong. Rec. S. 21638 (daily ed., 92d Cong., 1st Sess., Dec. 14, 1971).

[123] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[124] 47 U.S.C. 152(a) (1976). *See also* National Broadcasting Company, Inc. v. United States, 319 U.S. 190, 219 (1943).

[125] 47 U.S.C. 153(a)-(b) (1976).

to radio stations engaged in chain broadcasting," [126] to "encourage the larger and more effective use of radio in the public interest,[127] and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." [128] Moreover, in applying these provisions, the Commission can regulate network practices that do not serve the "public interest, convenience, and necessity." [129]

The Supreme Court confirmed the broad and expansive authority of the Commission to regulate broadcasting activities in *U.S.* v. *Southwestern Cable Co.*[130] There, the Commission had issued cable system signal carriage rules even though the Communications Act did not expressly authorize regulation of the cable industry. The Court stated:

> The Commission has reasonably found that the successful performance of [its broad responsibilities for the orderly development of an appropriate system of local television broadcasting] demands prompt and efficacious regulation of community antenna television systems. . . . [W]e may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." [131]

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[126] 47 U.S.C. 303(i) (1976).

[127] 47 U.S.C. 303(g) (1976).

[128] 47 U.S.C. 303(r) (1976).

[129] 47 U.S.C. 302(a) (1976).

[130] 392 U.S. 157 (1968).

[131] *Id.* at 177, *quoting* Permain Basin Area Rate Cases, 390 U.S. 747, 780 (1968).

The Court defined the Commission's authority to regulate as

> restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.[132]

The Commission's action in applying Section 312(a)(7) to the networks is an exercise of its power "reasonably ancillary" to the effective enforcement of the provision.

VI. Mootness

Prior to oral argument, the court asked the parties to submit papers addressing the question of mootness. The court's request was prompted by the fact that CMPC had agreed to accept a 5-minute segment on CBS in December and had contracted to buy a 30-minute segment on ABC in January. The Petitioners, the Respondents, and CMPC as *amicus curiae* submitted briefs on this question. The parties unanimously contended that the cast is not moot. We agree.

This case presents a situation where a short-term administrative order is "capable of repetition, yet evading review." *Southern Pacific Terminal* v. *ICC*, 219 U.S.

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[132] *Id. See also* Mt. Mansfield TV, Inc. v. FCC, 442 F.2d 470, 480 (1971); General Telephone Co. of Calif. v. FCC, 413 F.2d 390, 403 (1969). In contrast to FCC v. Midwest Video Corp. (*Midwest II*), which is cited by the networks, the Commission here imposed on the targets of its ancillary jurisdiction (the networks) an obligation of a character which *could* be imposed on individual television licensees. Congress itself has identified reasonable access to broadcast facilities as a statutory goal. Clearly, the Commission has authority to regulate the networks "with a purpose affirmatively to promote [a] goal pursued in the regulation of television broadcasting."

498, 515 (1911). The Supreme Court has recently articulated two conditions implicit in the *Southern Pacific* formulation:

> (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.[133]

Here it is clear we have a short-term situation. Moreover, it is certain that the parties will confront each other in this situation again.

In the context of elections where fragile rights are at stake, courts must be careful to avoid dismissing litigation as moot.[134] In *Flory* v. *FCC*,[135] for example, the Seventh Circuit rejected a contention that an appeal of an FCC decision under Section 315 was mooted by the fact that the election in question had already occurred. Indeed, the Supreme Court has indicated that utilization of the "capable of repetition" exception is especially appropriate where the issue is the interpretation of a statute that impacts upon the electoral process.

> The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks [on a statute]. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the

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[133] Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2904 (1979), *quoting* Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

[134] *See, e.g.*, Moore v. Ogilvie, 394 U.S. 814 (1968).

[135] 528 F.2d 124 (7th Cir. 1975).

> likelihood that timely filed cases can be adjudicated before an election is held.[136]

That is exactly the case at hand.

VII. Conclusion

We hold today that Section 312(a)(7) of the Communications Act does create an affirmative right of access in candidates for federal elective office.

We hold that, in implementing this right of access, the FCC has articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access. Under these standards, the obligation (or lack thereof) of a network or licensee to provide access to a candidate for federal office is judged in two stages. First, no request for time need be granted prior to the start of the election campaign, a date determined by the Commission with reference to all relevant facts and circumstances. Second, once the campaign has begun, individual requests by candidates must be treated *individually* by the network or licensee. They may be denied only with advertence to factors enunciated by the Commission, and the reasons for denying the *individual* request must be articulated. Across the board denials will not be tolerated. The Commission, for its part, will not substitute its judgment for that of the network or licensee in handling individual requests. It will confine itself to the task of ensuring that the broadcaster has considered and addressed all the relevant factors in the individual case and that the offered explanation for the decision is reasonable.

We hold that Section 312(a)(7), thus interpreted, is consistent with the requirements of the Constitution.

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[136] Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

We hold that the FCC is justified in applying Section 312(a)(7) to the networks.

And, finally, we hold that in the cases before us the Commission properly found that the networks had failed to fulfill the obligation imposed upon them by Section 312(a)(7).

We therefore affirm.

So ordered.

TAMM, *Circuit Judge, concurring*: When government regulation of our system of freedom of expression [1] calls for a federal agency to decide whether and to what extent the "individual needs" of particular candidates for federal office demand that they be heard on the radio and television airwaves, the danger of nonneutral government decisionmaking raises grave first amendment concerns. Although I join Judge Bazelon's fine opinion for the court, I write separately to discuss the danger that I perceive and to explain my reasons for concurring despite this danger.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Supreme Court held that the first amendment does not always prevent the federal government from regulating radio and television broadcasts on the basis of their content. In particular, the Court endorsed the Federal Communications Commission's "fairness doctrine," which imposes a twofold duty on the broadcaster: "The broadcaster must give adequate coverage to public issues, and coverage must be fair in that it accurately reflects the opposing views." *Id.* at 377 (citations omitted). In the form approved by the Supreme Court,[2] the fairness doctrine imposes only a general obligation on broadcast licensees, and broadcasters retain wide flexibility concerning the manner in which they will satisfy this obligation.[3] The Court has stated that the Commis-

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[1] *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

[2] The Court's decision in *Red Lion* did not require "approv[al] of every aspect of the fairness doctrine." 395 U.S. at 396.

[3] "At center stage of the Commission's regulatory scheme is its determination that broadcasters should have maximum editorial discretion in deciding how to fulfill fairness doctrine obligations." American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S.Ct. 662 (1980).

sion's only responsibility under the doctrine "is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 127 (1973).

The Court in *Red Lion* also affirmed the constitutionality of three right-to-reply doctrines. Two of these, the "personal attack" and the "political editorial" rules, are administratively developed offshoots of the general fairness doctrine:

> When a personal attack has been made on a figure involved in a public issue, . . . the individual attacked himself [must] be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine.

395 U.S. at 378. The third right-to-reply doctrine, the equal-time rule, is statutory in origin. Section 315 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 315 (1976), provides: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ."

Id. § 315(a). *See Red Lion Broadcasting Co.* v. *United States*, 395 U.S. at 391.[4]

Under *Red Lion*, "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount," *id.* at 390, particularly when what is at stake is " 'speech concerning public affairs,' " *id.* (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964)). *See also FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-800 (1978). Nonetheless, the first amendment also values broadcaster discretion. As Chief Justice Burger noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973),

> [The] role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

Id. at 117 (opinion of Burger, C.J.). As Judge Bazelon's opinion persuasively demonstrates, the limited access scheme created by section 312(a)(7) of the Act, 47

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[4] These right-to-reply doctrines would be intolerable if applied to the print media. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). A different rule applies to broadcasters on the theory that it is legitimate for the government to allocate the use of a finite number of broadcast frequencies, and it is therefore legitimate for the government to reallocate part of the use of a frequency previously granted to a particular licensee. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. at 388-92. *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 282 (1933).

U.S.C. § 312(a)(7) (1976), as interpreted and applied by the Commission, is consistent with these principles.

There is another principle, however, that limits the ability of the government to regulate broadcasting: although the government may play a role in regulating the content of broadcast communications, that role must be carefully neutral as to which speakers or viewpoints are to prevail in the "marketplace of ideas." Thus, while the government may properly take action to encourage a wide-open debate on public issues,[5] *see Buckley* v. *Valeo*, 424 U.S. 1, 92-93 & n.127 (1976), it may not regulate in a manner that advances "one side of an issue rather than the other," A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).[6] As Justice Stevens noted in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.* at 745-46 (opinion of Stevens, J.). *See Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1034 (D.C. Cir. 1971) (there is a "requirement of government neutrality in the area of the First Amendment"). *See also Red Lion*

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[5] This country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[6] There is a similar requirement of neutrality under the establishment-of-religion clause of the first amendment, in that government may not "prefer one religion over another." Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The requirement of religious neutrality goes further, however, by precluding the government from aiding the cause of religion generally, even if it could do so without favoring any particular religion. *See id.* The government is, on the other hand, permitted to further the general cause of freedom of expression. *See* Buckley v. Valeo, 424 U.S. 1, 92-93 & n.127 (1976).

Broadcasting Co. v. *FCC*, 395 U.S. at 396 (constitutional problems would arise if "the official government view [were to] dominat[e] public broadcasting"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943) (constitutional problems would arise if the Federal Communications Commission were authorized "to choose among applicants [for licenses] upon the basis of their political, economic or social views"). *Cf. Buckley* v. *Valeo*, 424 U.S. at 48-49 (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").[7] Accordingly, broadcast regulation must be tailored to guard against government action that is nonneutral, *i.e.*, government action that, by purpose or effect, tends to enhance the persuasive appeal of a particular speaker or viewpoint vis-à-vis opposing speakers or viewpoints.[8]

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[7] Judge Bazelon analogizes the government action here under review to a "time, place, and manner" restriction. Maj. Op. at 46 n.116. Significantly, however, such restrictions may not " 'slip from the neutrality of time, place, and circumstance into a concern about content.' " Police Dep't v. Mosley, 408 U.S. 92, 99 (1972) (quoting Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 SUP. CT. REV. 1, 29). Although broadcast regulation may to some extent "slip into a concern about content," it may not lose sight of the fundamental requirement of neutrality as between particular speakers or viewpoints.

[8] The requirement of neutrality here, as in other contexts, may be "notoriously difficult" to define. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). At least as to its "effect" component, for example, the requirement cannot be absolute; it would be impracticable to demand that content-based regulation never operate to favor, even in the slightest degree, one viewpoint over another. *See also* note 9 *infra*. One thing is clear, however: whatever its application in other contexts, the principle of neutrality is at its zenith in the context of

The broadcast regulation approved in *Red Lion* is consonant with this first amendment principle. The basic fairness doctrine protects against government nonneutrality by leaving broad and flexible discretion with the broadcaster; the Commission's circumscribed role in enforcing broadcaster obligations allows little opportunity for nonneutral government decisionmaking. The right-to-reply doctrines also limit the potential for partiality, this time by virtually eliminating the need for discretion on the part of anyone: if the licensee broadcasts a specified type of communication, the applicable right-to-reply obligation arises in a relatively "automatic" fashion.[9] More important, except for the very general[10] and rarely enforced[11] first prong of the basic fairness

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political speech. Difficulty of definition, of course, does not negate the importance of the basic constitutional requirement, nor does it excuse the judiciary from the task of formulating and applying fundamental principles of constitutional law.

[9] To be sure, even in deciding whether a fairness or a right-to-reply obligation has attached and, if so, whether it has been satisfied, the Commission might take action that improperly favors a particular speaker or viewpoint. This limited danger, however, is one that we tolerate because of the countervailing first amendment benefits that these doctrines generally produce by encouraging a balanced coverage of issues of public importance. *See also* note 8 *supra*.

[10] *See* American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 444 n.16 (D.C. Cir. 1979) (en banc), *cert. denied*, 100 S.Ct. 662 (1980); Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine*, 65 CAL. L. REV. 546, 578-86 (1977).

[11] The first prong of the fairness doctrine, the obligation to devote adequate broadcast time to the coverage of public issues, has been only minimally enforced by the Commission. *See* Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*,

doctrine, which requires adequate coverage of public issues, all of the regulatory devices approved in *Red Lion* are designed to ensure that a broadcaster who presents one side of a controversy will balance that coverage with a broadcast of the opposite view. This is the essence of evenhandedness, the antithesis of partiality.

Section 312(a)(7), as interpreted and applied by the Commission, presents a different and more suspect form of regulation. It is designed not to achieve a balanced presentation of ideas, but rather to grant air time to particular speakers for initial presentations of their views. The broadcaster obligation it creates, unlike that under the first prong of the fairness doctrine, is specific in nature and, as this case suggests, is likely to be enforced with some vigor.

The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the "individual needs" of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his "individual needs" against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for

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10 HARV. C.R.-C.L. L. REV. 137 (1975). "[T]he obligation to present controversial issues has been essentially unenforced The Commission has consistently sought to avoid even the appearance of regulating the content of programming and thus has continually left to the licensee's discretion the determination of which issues are sufficiently important and controversial to warrant coverage." *Id.* at 153. Indeed, at least in the view of two commentators, the obligation had *never* been enforced prior to the Commission's 1976 decision in Representative Patsy Mink, 59 F.C.C.2d 987 (1976). *See* Simmons, *supra* note 10, at 578-82; Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 739 (1974).

example, that a candidate requesting a half hour for a particular purpose may instead by entitled to only fifteen minutes, *see* Maj. Op. at 35-36; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.

Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's "individual needs," whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves. Although the Commission's standards are designed to apply neutrally to all candidates, and call for a rather deferential oversight of broadcaster determinations, there is nonetheless a much greater potential than in *Red Lion* for government favoritism, perhaps wholly unintentional, of particular speakers and ideas.[12]

Moreover, unlike the regulatory approaches upheld in *Red Lion*, section 312(a)(7) deals solely with candidates for federal political office; in evaluating the danger of government nonneutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests.[13] Although the Commission is independent of his

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[12] As CBS correctly observes, there is an "inherent danger in having a federal agency make determinations as to how much access and what kinds of access particular candidates should have, a danger which exists because of the risk that the agency under such circumstances could favor one candidate over another." Reply Brief of Petitioner CBS Inc. at 14.

[13] CBS contends that "[t]he inherently political nature of the question to be considered will draw the Commission into situations where its impartiality will be subject to obvious question. The danger that standards will not be applied

direct control, the President of the United States appoints all seven of its members and designates its chairman. *See* 47 U.S.C. § 154(a) (1976). Commissioners serve seven-year terms, and vacancies occur approximately once a year. *Id.* § 154(c).[14] To the extent that openings arise, the President may, and typically does, ensure that four of the seven Commissioners are members of his own political party. *See id.* § 154(b).[15] As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking.[16]

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neutrally necessarily suggests the unconstitutionality of the system of government regulation." Brief for Petitioner CBS Inc. at 44 (citation omitted).

[14] In fact, due to deaths and resignations, many recent Presidents have been able to make more than one appointment per year. *See* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 184 (1978).

[15] Even the limitation that no more than four Commissioners may be members of the same political party "is evaded easily if an appointee is willing to be labeled an 'independent.'" *Id.* at 184 n.36.

[16] Regrettably, there is some evidence that the Commission has, on occasion, been subjected to direct political pressure. In a 1970 memorandum describing administration efforts to

Despite these dangers, however, section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression.[17] Candidate access to radio, and especially television, is exceedingly important in a nation that places such extraordinary reliance on these informational media,[18] and we dare not forget that there is

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achieve more favorable press coverage by the three major television networks, Charles Colson, Special Counsel to then President Richard M. Nixon, indicated that, "as soon as we have a majority," he would pursue with Dean Burch, the newly-appointed Commission Chairman, a Commission ruling that would have "an inhibiting impact on the networks." Memorandum from Charles W. Colson to H.R. Haldeman, Sept. 25, 1970, *reprinted in* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 247. In a taped conversation in 1972, President Nixon himself threatened to use the Commission to retaliate against *The Washington Post* for unfavorable coverage: "The main, main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it renewed." Statement of Richard M. Nixon to H.R. Haldeman and John Dean, Sept. 15, 1972, *quoted in* S. REP. No. 981, 93rd Cong., 2d Sess. 149 (1974) (final report of Senate Watergate committee). For a further discussion of the potential for political use of the Commission, see Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137, 157-58 (1975). *Cf.* Columbia Broadcasting Sys., Inc. v. FCC, 454 F.2d 1018, 1036 (1971) (Tamm, J., concurring) (concluding, "although hesitantly, [that in the case then under review] the Commission ha[d] taken a political role of interference contrary to all of the teachings of administrative decision-making").

[17] *See also* Buckley v. Valeo, 424 U.S. 1, 92-93 & n.127 (1976); note 6 *supra*.

[18] In a 1974 survey of prominent educators, businessmen, labor leaders, and government officials, television was rated the most powerful institution in the United States. The

also a potential for evil in leaving the question of access in the hands of private broadcasting interests. As the Supreme Court warned in *Red Lion*, we should guard against

> station owners and a few networks [having] unfettered power to make time available only to the highest bidders, to communicate only their views on public issues, people and candidates, and to permit on the air only those with whom they agree[]. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

395 U.S. at 392.[19] By creating a right of access in favor of candidates for this country's highest offices, section 312(a)(7) increases the opportunity for these speakers to reach listeners with the discussion of crucial political issues.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance

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White House ranked second, the Supreme Court third. *Who Runs America? A National Survey*, U.S. NEWS & WORLD REP., Apr. 22, 1974, at 30. *See also* S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 1-2 (1978).

[19] *Cf.* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 62 (D.C. Cir. 1972) ("The first amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many."), *cert. denied*, 412 U.S. 922 (1973).

> that candidates have the unfettered opportunity to make their own views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. *Valeo*, 424 U.S. 1, 52-53 (1976).[20] To give increased play to ideas touching the very essence of our democracy is a goal that surely lies near the heart of the first amendment.

Thus, section 312(a)(7), as implemented by the Commission, stands precariously on the first amendment tightrope. It raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another. Yet it also makes a great contribution to the cause of encouraging an "uninhibited, robust, and wide-open"[21] discussion of issues central to our system of government.

We could not give effect to the statute's positive contribution to first amendment values in the absence of adequate safeguards for controlling the danger of nonneutrality. In my view, the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity. In particular, the Commission is strictly limited to the narrow role of overseeing broadcaster determinations concerning access, determinations that are entitled to great deference before the Commission. Moreover, both at the broadcaster level and before the Commission on review, analysis of the "individual

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[20] *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the [first amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office").

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). *See* note 5 *supra*.

needs" factor must focus solely on the candidate's needs *as stated by the candidate* and, giving due consideration to the other relevant standards set forth by the Commission, how those needs can be accommodated by the broadcaster. The agency is obliged to affirm any broadcaster decision that is reasonable under the Commission's articulated standards, and it disapproved the network decisions in the present case only because the networks had, in effect, imposed "flat bans" on the sale of the type of time that the Carter-Mondale Committee sought. If the networks had instead given reasonable consideration to the particular request that was made, the Commission would have had no choice but to approve their access decisions.[22]

The Commission, through its implementation of section 312(a)(7), has come perilously close to falling into the chasm of impermissible government action. Nonetheless, as long as the agency consistently maintains a very limited "overseer" role consistent with its obligation of careful neutrality, its action does not contravene the Constitution. With this understanding, I concur in the opinion of the court.

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[22] Another significant factor in deciding the constitutionality of § 312(a)(7), as implemented, is the presence of the equal-time provision in § 315 of the Act, 47 U.S.C. § 315 (1976). Section 315 generally will create a right to reply in favor of the opponents of any candidate granted access under § 312(a)(7), thus serving as an important safety net by mitigating the effect of any nonneutrality that might creep into the § 312(a)(7) decisionmaking process. If this were not the case, § 312(a)(7), as implemented, would raise a different and more troublesome constitutional question. That question, of course, is one for another day.

APPENDIX B

FCC 79-750

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE COMPLAINT OF
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

against

THE ABC, CBS and NBC TELEVISION NETWORKS

MEMORANDUM OPINION AND ORDER

(Adopted: November 20, 1979;
Released: November 21, 1979)

BY THE COMMISSION: COMMISSIONERS FERRIS, CHAIRMAN AND FOGARTY ISSUING A SEPARATE JOINT STATEMENT; COMMISSIONERS LEE, WASHBURN AND JONES DISSENTING AND ISSUING STATEMENTS; COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT.

1. On October 29, 1979, the Commission received a complaint from the Carter-Mondale Presidential Committee, Inc. (the Committee) under the "reasonable access" provision of Section 312(a)(7). The Committee alleges that the ABC, NBC and CBS Television Networks violated the provision by refusing to sell it a thirty-minute prime time program to be used by the President in his capacity as a candidate for the Democratic nomination. The Committee states that the time requested will be used for an appearance by the President shortly after he declares his candidacy; that whether the President is a legally qualified candidate is not an issue since

none of the networks have made a claim to the contrary; and that in any event there should be no question as to whether he is legally qualified once a formal declaration of candidacy has been made.

2. The Committee claims that the reasons given by the networks for their refusal to sell the time are "totally insufficient to justify their actions." Specifically, it states that the contention of NBC and ABC that it is "'too early' to begin a presidential campaign" is "insufficient" since significant amounts of news coverage have been devoted to the campaign and "actions speak louder than words"; that the allegation of CBS and NBC that they would have to honor requests of other candidates is "sufficient" since there is a "relatively limited number of national candidates . . . that are willing and able to purchase network . . . time"; and that CBS' allegation that "it would involve 'massive disruptions' of [its] regular . . . schedules" is "insufficient" because only a few half-hour periods of entertainment programming would have to be rescheduled. In this connection, it states that CBS has offered to sell a five-minute period at 10:55 p.m on December 8, 1979 and another in the daytime. However, the Committee claims that "[i]t is past the four day time period requested, insufficient in amount and unsuitable to the needs of the candidate." The Committee also states that further evidence of the networks' attitude toward their political broadcasting responsibilities can be found in newspaper articles enclosed with the complaint.

3. The Committee argues that there is no question as to whether the Commission has jurisdiction to resolve this matter since the Commission has "long recognized" that the networks as licensees of the "most important broadcast stations in the nation" are subject to its jurisdiction. To support this argument, the Committee cites a Commission policy statement where we stated that po-

litical broadcasting rate restrictions would be applicable to networks since networks are, in effect, selling time on behalf of their affiliates. The Committee further argues that the networks' refusals to sell the requested time constitutes a "blatant denial of reasonable access." It requests that the Commission order the networks to make time available for purchase.

4. On October 30, 1979, the Broadcast Bureau requested the networks' comments on the complaint by November 5, 1979. All three networks claim that their refusal to sell the requested time at this point cannot be found to be an abuse of discretion and that therefore the complaint should be denied. They argue that such sales are presently premature and that their decisions are reasonable in light of the unusually large number of candidates seeking the major party presidential nominations. Specifically, ABC states that at least nine candidates have already declared that they will seek the Republican Party nomination, and that a major Republican leader and two major Democratic leaders have indicated that they will announce in the next few weeks. CBS states that at least three Democrats and eleven Republicans are reasonably expected to seek the presidential nomination. NBC states that there are at least twelve actual or potential candidates seeking the presidential nomination that have held federal elective office or been governor of a state, plus at least 110 others that have filed notices of candidacy with the Federal Election Commission. They also argue that the complainant's assertion that there will only be a "relatively limited" demand for network half-hours is purely speculative and that the potential for significant disruptions in normal schedules is real and substantial. Both ABC and NBC contend that a single state caucus should not be sufficient to trigger access to *national* network time and that since the Democratic convention will not be held until August, their decision to deny the Committee's request cannot

be found to be unreasonable. ABC and CBS both assert that although the Committee is technically correct that only other Democratic party candidates would be entitled to "equal opportunities," they do not believe that they could reasonably decide to grant access to the Democratic Party and refuse access to the Republican Party.

5. NBC argues that the question before the Commission is whether the network was unreasonable in reaching its decision and that its judgment cannot be ruled unreasonable in light of the fact that it has considered the factors specified in the Commission's July 1978 Public Notice relating to the enforcement of Section 312(a)(7).[1] NBC asserts that during the preconvention period, the campaigns are waged on a state-by-state basis and are best covered by the communications media serving the state in question. NBC contends that it does not appear that Section 312(a)(7) applies to networks since it applies to the use of a "broadcasting station" and it is contained in a section of the Communications Act relating to license revocation. It claims that even were the networks to carry the program in question, there is no assurance that individual stations would choose to broadcast it; that the sale of the requested time period would require it to afford equal opportunities to the President's legally qualified opponents for the Democratic nomination; and that absent significantly different factual circumstances, similar access periods would have to be made available to legally qualified candidates for the Republican nomination. NBC states that it does not generally sell individual program periods to commercial advertisers and that the Commission itself has recognized that reasonable access requires only that the licensee follow its usual commercial practices. NBC urges the Commission to recommend that Congress repeal or suspend Section

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[1] *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978).

315 so that broadcasters will be able to establish "reasonable limits to the forced disruption of program schedules [necessary] to present candidates in which the public has little or no interest."

6. ABC claims that the only question posed by the complaint relates to *when* access should be granted and that this question may not properly be before the Commission inasmuch as it comes on behalf of a person who is not yet a legally qualified candidate. It states that it has decided to sell political time to candidates seeking nomination at the national political conventions beginning with the first week of January 1980 and that this decision is warranted in light of the nature and length of the presidential campaign. ABC anticipates that numerous requests for time will be made during the period leading up to the national election. It asserts that its continuing news coverage of the campaign insures that "the mixture of issues, developments . . . and personalities that dominate this early stage of the campaign are brought to the public's attention."

7. In response to the Committee's claim that the networks' news coverage of the campaign should be taken as evidence that the compaign has begun, ABC points out that the legislative intent in adopting the news coverage exemptions of Section 315 was to foster news coverage of political campaigns. In light of this intent, ABC argues that journalistic pursuits should not be used as a trigger for the "reasonable access" provision since such a policy would inhibit news coverage of the campaign.

8. CBS states that it has offered to sell two five-minute time periods to the Committee and that this offer is "fully consistent with the reasonable access provision." It asserts that campaigns for the presidential nomination consist of a series of state primary elections, conventions and caucuses conducted on local levels over many months. CBS contends that in its judgment the public interest

does not require preemption of extensive segments of its national programming for half-hour political broadcasts at this point in the campaign. It argues that although the complainant asserts that it does not intend to make such purchases a regular practice, it cannot bind other candidates in this regard and that while complainant argues that this matter should be viewed in light of the candidates' needs and not the networks' beliefs, prior Commission decisions make clear that the candidates' desires are not always paramount and that broadcasters have substantial discretion in this area.

9. CBS states that its decision is supported by Commission precedent. Specifically, it cites *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972), where the Commission stated that the standard of review in Section 312(a)(7) cases is one of reasonableness, and *Letter to Paul A. Talmey*, 49 FCC 2d 678 (B/c Bur. 1974), where the staff acknowledged that a five-minute time segment constitutes a program. It also cites our decision in *Complaint of Hon. Pete Flaherty*, 48 FCC 2d 838 (1974), where we emphasized that we would not prescribe a precise formula for measuring compliance with Section 312(a)(7) and our 1978 policy statement where we stated that "the public is entitled to other kinds of programming than political." Although CBS recognizes that there is a distinction between senatorial and presidential races, it also relies on *Anthony R. Martin-Trigona*, 66 FCC 2d 968 (B/c Bur. 1977), *aff'd* 67 FCC 2d 743 (1978), where the staff denied a complaint of a candidate in a United States Senate primary that a licensee's refusal to sell him announcement time until forty-five days before the election violated Section 312(a)(7). Despite the fact that the Committee's complaint involves a presidential campaign and not a senatorial campaign, CBS argues that an adverse Commission ruling in this matter would be irrecon-

cilable with the cited authorities because CBS has not refused to sell prime-time program time to the candidate.

10. The complainant's response in opposition to the comments submitted by the networks was filed with the Commission on November 8, 1979. The Committee takes issue with the networks' assertion that it is "too early" to sell the requested time. It argues that the "national presidential campaign is now well underway" [2] and that the "networks cannot simply follow their prior practices" because "Campaign 80" is different from previous election years. It argues that CBS has failed to consider the candidate's needs in reaching its decision; that the purpose of the proffered program is to "set the tone for the [President's] entire campaign"; and that this purpose cannot be accomplished at a later date.

11. Citing the networks' claim that the preconvention campaigns are conducted on a state-by-state basis, the complainant argues that the campaigns now underway are "not a series of isolated local elections, but integrated, nationwide efforts." It asserts that "[w]hile the preconvention period focuses on obtaining delegates from the various states, it reality presidential nominating campaigns are nationwide in scope." As to the networks' contention that there is a "multiplicity of candidates" problem, the Committee states that 14 candidates is not an "inordinate number, particularly when . . . the networks have access obligations only toward candidates for [the one] office [in question]" and that even assuming

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[2] To support this allegation, the Committee relies on the following facts: (1) CBS altered its regular programming to move its documentary on Senator Edward M. Kennedy to November 4, 1979 so that it would precede his announcement of candidacy; (2) CBS news has reported that the Kennedy campaign is "getting into full swing"; and (3) a debate between Senator Kennedy and President Carter will be held on January 7, 1980.

that all 13 other candidates would desire to make a similar purchase, the networks would only have to make one half-hour, per week, per network available.

12. Regarding the networks' claim that substantial programming disruptions would result from the sale of the requested time period, the Committee argues that it gave the networks "considerable leeway in providing availabilities" and that the networks regularly make scheduling changes for their own commercial purposes. The complainant further argues that if a "multiplicity of candidates" problem in fact exists, then the networks would have a responsibility to solve the problem by making time available early in the campaign and that of all the broadcasters in the country, the networks are in the "weakest" position to raise the "multiplicity of candidates" defense since they have only one group of candidates to serve, namely Presidential candidates.

13. The complainant asserts that the networks place "excessive reliance on the traditional licensee discretion concept" since this concept was modified by Congress when it enacted Section 312(a)(7). If further asserts that the "essential purpose of enacting Section 312(a)(7) was to place new and additional obligations on broadcasters with respect to candidates for federal office."

14. On November 9, 1979, the National Association of Broadcasters (NAB) filed comments on the matter.[3] It argues that in view of a "mounting series of court decisions [upholding] the vital First Amendment interest in shielding journalistic decisions made by broadcasters . . . from Government second-guessing," it is of the "utmost importance that the reasonable access provision be interpreted . . . in light of a standard which gives great weight to the editorial discretion of broadcasters." The NAB

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[3] The NAB filed its comments as *amicus curiae*, to "underscore the interest of broadcast licensees in this proceeding."

claims that the networks' decisions not to sell half-hour programs to Presidential candidates until sometime in early 1980 is "clearly not unreasonable" since the Democratic National Convention will not be held until August 11, 1980.

15. The Committee responded to the NAB's comments in a letter dated November 9, 1979. It states that "to the extent that First Amendment considerations are involved in this matter, they firmly support the Committee's complaint" because Section 312(a)(7) promotes the goals of the First Amendment. The Committee further states that the NAB's "business as usual approach . . . to the positive duties imposed upon broadcasters by Section 312(a)(7) shows the importance of the issues raised by the Committee and the need for a definitive ruling" and that the "NAB's concerns for its membership go far beyond the precise issue which is now before the Commission. . . ."

16. On November 13, 1979, comments were received from the National Citizens Committee for Broadcasting (NCCB), a nonprofit public interest group. NCCB states that it agrees with the Committee's contention "that Congress intended that candidates, not broadcasters, should determine when campaigns begin and when political broadcast time should be purchased." NCCB also agrees with the Committee's assertion that it is the "viewers' rights to be informed . . . that were the basis for the enactment of Section 312(a)(7) and that are primarily violated by the networks' refusal." NCCB asserts that "the Commission should find that the current presidential campaign is in full swing and the networks' willful refusal to provide a half-hour of prime time to the Committee violates Section 312(a)(7)." NCCB requests that the Commission clarify two points: (1) whether the networks would have a responsibility to provide time to all legally qualified candidates regardless of party affiliation

once they provide time to Carter, and (2) whether President Carter will be a legally qualified candidate after he announces his intention to seek reelection even though he may not have qualified in ten states.

Discussion

Statute and Legislative History

17. Section 312 provides in pertinent part as follows:

> (a) The Commission may revoke any station license or construction permit—
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> * * * * *
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The statutory language thus authorizes the Commission to revoke a broadcast station license for failure to allow a candidate's reasonable uses of broadcast facilities. The statutory language, however, does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them.

18. The legislative history of Section 312(a)(7) does little to clarify those responsibilities and procedures. In considering Title I of S. 382, the Federal Election Campaign Act of 1971, the Senate Commerce Committee added the language that is now Section 312(a)(7).[4] The Senate

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[4] Title I of S. 382 as passed by the Senate also made exceptions to the equal opportunities requirement of Section 315(a) for Presidential and Vice Presidential candidates. In addition, it set maximum rates to be charged any candidates for Federal office. For the 45 days before a primary election and 60 days before a general election, the rates could not exceed the station's lowest unit charge for the same amount

Report on S. 382 establishes that one purpose of Title I was to "give candidates for public office greater access to the media." S. Rep. No. 92-96, 92d Cong., 1st Sess., p. 20 (1971). The second purpose was to "halt the spiraling costs of campaigning for public office." *Id.* The *Report* adds little more to the rationale underlying Section 312(a)(7). It merely comments that the obligation imposed in 312(a)(7) "is inherent in the requirement that licensees serve the needs and interests of the [communities] of license," and cites the Commission's 1960 *En Banc Programming Inquiry*. S. Rep. No. 92-96, *supra.*, at 34.

19. The floor debates are equally uninstructive. Senator Pastore, the floor manager of S. 382, explained the purposes of Title I and listed five steps the bill proposed to accomplish its goals. He did not mention Section 312(a)(7). *See* 117 Cong. Rec. 28792 (1971).

20. In trying to discern the purpose of Section 312(a)(7), it should be remembered that that provision was part of a statute that required broadcasters to charge candidates no more than the lowest unit charge in effect during the 45 days before a primary election and 60 days before a general election. *See* 47 U.S.C. § 315(b)(1). It could be argued that Section 312(a)(7) should therefore be applied only during those periods. That argument does not seem to be a cogent one, however. If Congress intended Section 312(a)(7) to be read in conjunction with Section 315(b)(1), it would have stated that or at least provided some indication of that intention (i.e., by

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and class of time. Before that, they could not exceed the charges for comparable use. Title I also limited campaign spending by candidates. The Conference Committee deleted the Section 315(a) exceptions.

Title I of the 1971 Act was replaced by the Federal Campaign Act Amendments of 1974. Section 312(a)(7), however, was not amended or discussed.

placing the provisions in the same section. We therefore believe that Congress wanted Section 312(a)(7) to operate independently of Section 315(b)(1). This seems especially so since the predecessor bill to S. 382 had an access clause as a proviso to Section 315 amendments, which provided for lowest unit charges. *See* S. 3637, 91st Cong., 2d Sess., April 15, 1970. Congress then made a decision to distinguish the access clause from the lowest unit charge clause.

21. In the absence of further direction, we must also assume that Congress wanted to delegate to the Commission broad responsibility to define and implement the scope of Section 312(a)(7)'s rights and duties. *Cf.* 47 U.S.C. §§ 154(i) and (j) and 303(r).

22. *Jurisdiction.* Before addressing the specific factors and procedures applicable to a determination under Section 312(a)(7), we must first consider our jurisdiction to act. NBC contends that Section 312(a)(7) does not apply to networks. It points out that that provision refers to use of a "broadcasting station" and that section is contained in a section of the Communications Act dealing with license revocation.

23. We believe that NBC's argument is contrary to Commission precedent. The Commission has interpreted the term "broadcasting station" to refer to networks as well as licensees, albeit in a different context. There are two separate factors which warrant this conclusion: first, the networks themselves are television licensees and, second, in many programming matters the networks also act as agents for their respective affiliates. In interpreting the "lowest unit charge"[5] provision which refers to use of a "broadcasting station," for example, we stated that:

> The Commission is of the view that although the Campaign Communications Reform Act does not spe-

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[5] 47 U.S.C. 315(b)(1).

> cifically refer to networks, the provisions are intended to apply to the purchase of network time. A network is in a real sense selling time on behalf of station licensees and the Commission interprets new Section 315(b)(1) as applying to the combination of licensees in the network as well as to the individual licensees.

Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, 525-26 (1972).

24. Similarly, in construing the "equal opportunities" [6] provision which also refers to use of a "broadcasting station," the Commission stated that:

> Although Section 315 obligations attach to individual station licensees, where a complaint is based on a network program and addressed to a network organization . . . the Commission has always accepted this approach as a basis for issuance of a ruling on the matter. Additionally, it may be noted that each of the networks involved herein are licensees of their "owned and operated" broadcast stations.

Senator Eugene McCarthy, 11 FCC 2d 511, n.1 (1968).

25. We see no reason for adopting a different approach in cases arising under the "reasonable access" provision of Section 312(a)(7).[7] The fact that the provision is contained in a section of the Communications

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[6] 47 U.S.C. 315(a).

[7] We also draw upon analogous case law under Section 303(i), 47 U.S.C. § 303(i). There the question was whether the term "radio stations" in Section 303(i) encompassed both the networks and the individual licensees for purposes of imposing on both the Commission's prime time access rules. The Court of Appeals held that networks were "radio stations" for purposes of Section 303(i). *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 481 (2d Cir. 1971).

Act dealing with license revocation does not constitute sufficient justification for a departure from the above cited precedent. In adopting Section 312(a)(7), Congress was surely aware of the networks' role in political broadcasting and the Commission view that the use of the term "broadcasting station" in the statute was sufficiently broad to give the Commission jurisdiction over the networks. *See, e.g., Committee for Fair Broadcasting*, 25 FCC 2d 283 (1970); and *Eugene McCarthy, supra.* If Congress wanted to apply a more restrictive definition of "broadcasting station" in Section 312, it had ample opportunity to do so. Instead, the Congress used language similar to that found in Section 315 and did not even suggest a narrower reading. Therefore, we must assume that Congress approved a continuation of our administrative practice. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). We believe that the legislative intent in enacting Section 312(a)(7) was both to impose a general obligation of access on the broadcast media and to establish license revocation as one remedy for violation of that obligation.[8] We will, therefore, interpret Section 312(a)(7) as applying to the combination of licensees in a network as well as to individual licensees. This interpretation is not only the most reasonable one under the circumstances but also one that is supported by cases which recognize that the Commission

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[8] We thus construe Section 312 as including two severable elements—one establishing a "reasonable access" obligation and the other a specific remedy. We note that in the element of Section 312(a)(7) which imposes an obligation to afford reasonable access, there is no specific phrase limiting the obligation's applicability to local broadcast stations. Our construction of the statute's applicability is consistent as well with our view that the phrase "broadcasting station" includes networks and with the Congress' basic purpose in adopting Section 312(a)(7).

has ancillary jurisdiction to regulate matters closely tied to its express statutory obligations.[9]

26. Our past precedent is not the only factor on which we base our conclusion that Section 312(a)(7) should be interpreted to apply to networks. We recognize that networks sell time as a unit on behalf of their licensees to presidential candidates. In view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312(a)(7).

27. Moreover, as noted above, the purpose of Section 312(a)(7) was to impose a general obligation of access on broadcasters. A ruling consistent with NBC's contention would mean that there would be no method of securing national access for presidential candidates to the chain of network affiliates other than to go to the individual affiliates themselves. We find that Congress did not intend the reasonable access obligation in Section 312(a)(7) to have such severe, practical limitations. In light of the significant role of the networks in the broadcasting industry and Congress' obvious knowledge of that fact, it would be unreasonable to conclude that Congress intended

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[9] Even if Section 312(a)(7) does not directly impose an obligation on the networks, such an obligation is clearly imposed on network-affiliated licensees under the statute. Our power to adjudicate complaints involving requests for access to the networks is surely "reasonably ancillary to the effective performance of the Commission's various responsibilities. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see, e.g., National Broadcasting* v. *United States*, 319 U.S. 190 (1943); *Mt. Mansfield Television, Inc.* v. *FCC*, *supra.*, 442 F.2d at 481-87; *Metropolitan Television Co.* v. *FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961); and the statutory provisions cited therein.

to exempt the networks from the requirement of Section 312(a)(7).[10]

28. *Section 73.1940(a).* The Committee contends that the question as to whether the President is a legally qualified candidate is not an issue since none of the networks has raised the question. We have ruled otherwise. Thus, in *Anthony R. Martin-Trigona (WGN)*, 67 FCC 2d 743, 745 (1978), the Commission stated:

> [T]he burden is on a complainant to establish that he qualifies under Commission Rules as a legally qualified candidate before the Commission will take action on a complaint filed under Section 315 or 312(a)(7) of the Communications Act. This is true whether or not a licensee has claimed that the candidate is not legally qualified (footnote omitted).

29. The only information that the Committee has provided to show that the President has qualified within the meaning of Section 73.1940 is a statement that he will announce his candidacy prior to the proffered program. However, a public announcement standing alone is not sufficient to satisfy our definition of a legally qualified candidate. Under Section 37.1940(a)(1)[11] a candidate must also show that he has qualified for the Presidential primary ballot in the state in question or that he has

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[10] Insofar as it may be argued that the reach of the "reasonable access" obligation in Section 312(a)(7) can extend only to those persons granted "any station license or construction permit," we note that each of the network corporations is a multistation licensee fully reachable by our revocation authority. But, in any event, we do not agree that the substantive Section 312(a)(7) obligation is to limited in its reach as to extend only to network corporate entities that happen to be also Commission licensees or permittees.

[11] Obviously, the President has satisfied the criterion regarding his eligibility to hold the office.

made a "substantial showing of bona fide candidacy" in the state. To qualify nationwide, a candidate must satisfy this requirement in at least ten states. The Committee has provided no evidence to show that the President has made a "substantial showing of bona fide candidacy" in any state or that he has qualified for any state primary.

30. The Committee has said, however, that the President will have met the qualifications for candidacy in ten states on or before the earliest date of the requested broadcast time. Neither CBS nor NBC considers this issue to be a bar to the granting of the candidate's request, since neither network raised it as a reason for denial of time. ABC did raise the issue tangentially in a footnote in which it noted that the President was "not yet" a legally qualified candidate. However, ABC offered nothing to contradict the Committee's contention that the President would be a qualified candidate prior to the date of the broadcast. Nor did ABC base its decision on this point. In circumstances where the candidate (through his representative) has said he will be a qualified nationwide candidate on or before the date for which he requests network time and no one has cast any doubt on the factual accuracy of the candidate's assertion, it would be inconsistent with the intent of Section 312(a)(7) for the networks to deny access on that basis or for the Commission to decline to review the networks' decisions.[12] In these

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[12] This is particularly so here where the initial step to becoming a qualified candidate is entirely in the candidate's hands. All he has to do is make an announcement of candidacy. The qualification of filing before state election authorities to obtain a place on the ballot is largely ministerial and often follows almost immediately upon the announcement of candidacy. In lieu of filing with the state authorities, the presidential candidate may show that he had engaged in political campaign activities in the requisite number of states. 47 CFR §§ 73.1940(a)(4)(ii) and (a)(5).

circumstances, we read the "legally qualified" language as having an implicit temporal reference to the date(s) of requested access not the date of the request. This is not to say, however, that the networks would be acting unreasonably in another context of denying access in part on the basis of a factual dispute over whether the candidate will be legally qualified on the access date requested. But, in the present context of undisputed fact, it would be contrary to the purpose of Section 312(a)(7) for the networks not to be obliged to rule on the access request (or for the Commission not to review the networks' decisions) until the candidate has formally announced and become qualified. The delay involved in such a procedure might make it impossible for a candidate to obtain Commission relief in time to fulfill his plan of using his reasonable access rights promptly after his announcement of candidacy. And even if the networks were otherwise inclined to grant access, the last-minute scheduling disruption which would result from postponing the request and response until the legal qualification process was technically completed, might tend to discourage a grant of access. However, if the President is not a legally qualified candidate nationwide at the time of the broadcast, the networks need not honor the President's request for time.[13]

31. *Reasonable Access.* On July 12, 1978 the Commission adopted a *Report and Order*[14] clarifying its policy in enforcing Section 312(a)(7). There we reaffirmed our policy of relying on the "reasonable, good faith judgments of licensees as to what constitutes reasonable access under

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[13] We believe that the foregoing discussion answers NCCB's request that we "clarify" whether the President will be a legally qualified candidate prior to the proposed broadcast.

[14] *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978) (*Report and Order*).

all of the circumstances present in particular cases." [15] the Commission would consider in evaluating any com- We made it clear, however, that the broadcaster's discretion is not unlimited. We set forth specific factors that plaint that a broadcaster was not acting reasonably.[16] The identified factors which we consider relevant to a Section 312(a)(7) judgment are: the candidate's needs, the number of candidates, and the availability of classes of time. 68 FCC 2d at 1090. While each of these factors is relevant, we placed particular emphasis on the candidate's needs. Thus, we stated that:

> Federal candidates are the intended beneficiaries of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access.

68 FCC 2d at 1089, n. 14. In taking this factor into account, the licensee is not simply to substitute its judg-

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[15] 68 FCC 2d at 1094.

[16] In evaluating "reasonable access" complaint (including the instant one) we apply a mode of analysis analogous to that which the courts use in reviewing discretionary decisions by an agency. In determining whether the agency violated the Administrative Procedure Act by acting in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)), the reviewing tribunal must take a hard look to see whether the decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). In the instant context, we may not simply substitute our de novo judgment regarding the access request and the networks' responses, but must "judg[e] the objective reasonableness" of the networks' explanation of their actions. *Straus Communications, Inc.*, v. *FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976).

ment regarding the candidate's needs for the candidate's own assessment of those needs, but the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against other factors which we have said are relevant. The Commission further stated that, absent unusual circumstances, "reasonable access" requires that a candidate be afforded program time in prime time. However, we recognized that an offer of prime time program time itself is not enough. The candidate must also be afforded flexibility to address the prime time audience in the manner best suited to his campaign. For instance, we explained that:

> . . . an *arbitrary "blanket" ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee.*

68 FCC 2d at 1090 (emphasis added).

32. In assessing the candidate's needs, of course, consideration has to be given to the dynamics of the particular campaign and the point in a campaign at which a licensee's obligation to afford reasonable access begins. In this regard the Commission stated that:

> The setting of such a limit is difficult because each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates. *For instance, a presidential campaign may be in full swing almost a year before an election;* other campaigns may be limited to a short concentrated period.

68 FCC 2d at 1091 (emphasis added).

33. The Commission concluded that Section 312(a)(7) would take effect at least during the periods when the "lowest unit charge" provision was applicable. Accordingly, we stated that a licensee would be unreasonable in refusing to afford access within 45 days prior to a primary and 60 days prior to a general or special election. The determination as to whether "reasonable access" obligations would attach before these periods for particular races was left to be decided on a case-by-case basis.

34. The question of when access should begin has only been decided by the Commission in the context of non-presidential federal candidates. One case involved a candidate for the U.S. Senate whose request to purchase broadcast time was refused by a radio station licensee in August, 1977, for a primary election scheduled for March 21, 1978. The Broadcast Bureau denied that candidate's complaint under Section 312(a)(7) on the ground that he was not a legally qualified candidate. *Anthony R. Martin-Trigona*, 66 FCC 2d 968 (1977). Subsequently, on January 2, 1978, that same licensee began to sell time to the complainant. The Commission later denied complainant's petition for reconsideration on the ground that licensee was not unreasonable in providing access beginning 78 days before the primary election. *Anthony R. Martin-Trigona*, 67 FCC 2d 743, 747 (1978). However, that case offers little guidance for purposes of determining when reasonable access should be granted to presidential candidates. To begin with, when that case came before the full Commission there were less than 78 days until the election, and the broadcaster had agreed to sell time to the candidate. Moreover, that case merely involved a statewide candidate looking toward a single primary election. By contrast, we are faced here with national candidates who are looking toward a series of primary elections, caucuses, and other nominating processes in virtually all 50 states. The nomination of candidates to the nation's highest office is a uniquely important proc-

ess that requires special consideration as to when access to the broadcast media should begin.

35. In light of the conclusion that we reached in our July 1978 *Report and Order, supra.*, the test to be applied to determine whether the networks have complied with the "reasonable access provision" is one of reasonableness.[17] Thus, the reasons that each network has given to support its decision must be examined in light of the specified factors to determine whether each can be said to have acted reasonably and in good faith in fulfilling its obligations under Section 312(a)(7). In analyzing the networks' responses, we recognize that our decision concerns First Amendment interests—both those of the general public in full-ranging debate on electorate-informing issues and those of broadcast journalists in preserving their editorial discretion. While the constitutionality *vel non* of Section 312(a)(7) is basically a matter for Congress and the courts, we must interpret the statute, if possible, to effectuate Congress' intent while not unnecessarily impinging on the broadcasters' journalistic discretion.[18]

36. *NBC.* Applying the foregoing principles to the facts and circumstances presented here, we cannot find that NBC's policy, as applied to the President, reasonably fulfills its obligations under Section 312(a)(7). De-

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[17] In making judgments as to reasonableness, we note again the purpose of Section 312(a)(7)—to enlarge the basic fiduciary obligations of broadcasters to inform the electorate by making the media more accessible to federal candidates. *See* paragraph 18, *supra.*, and our *Report and Order, supra.*, 68 FCC 2d at 1087 and 1089. *See also Red Lion Broadcasting* v. *FCC, supra.*

[18] The reasonableness standard we use for review in 312(a)(7) cases, like the "reasonable and good faith" review standard in Fairness cases, must be applied with First Amendment interests in mind. See *Straus Communications Inc.*, v. *FCC, supra.*, 530 F.2d at 1001, 1008-9, 1011.

spite the emphasis that our July 1978 *Report and Order, supra* placed on the consideration that must be given to candidates' needs in making reasonable access decisions, NBC has apparently given no consideration to the Committee's determination that "the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States"; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date.

37. Moreover, as the Committee has pointed out, the reasons that NBC has in fact given to support its decision are "insufficient" and in the absence of further explanation we are unable to find that it acted reasonably in affording federal candidates access to its facilities as required by Sections 312(a)(7). NBC, in essence, cites three reasons to support its decision: (1) timing; (2) "multiplicity of candidates"; and (3) programming disruptions.

38. *Timing.* The Commission's 1978 *Report and Order, supra* recognized that a presidential campaign may be in full swing a year before the election. Yet NBC argues that at this point the campaigns are being waged on a "state-by-state" basis and that a national campaign has not yet begun. This argument is based on the assumption that the date of the national convention which is eight months away, is the relevant date in determining when "reasonable access" obligations should attach.[19]

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[19] As part of its "timing" argument, NBC also asserts that in the 1976 campaign, half-hour segments were not sold to candidates until March 31, 1976. While we recognize that a broadcaster's past practices in this area may be a relevant consideration, we do not believe that it is sufficient to justify a refusal to sell time. As the Commission stated in the July

39. We agree with the Committee that the 1980 presidential campaign has begun much earlier than previous campaigns and is already in full swing. We base our judgment on undisputed evidence submitted by the Committee, as well as matters which we can officially notice. For example, it is undisputed that 10 candidates have already formally announced their intention to seek the Republican presidential nomination; two candidates have already formally announced their intention to seek the Democratic nomination and a third, President Carter, states that he will make his formal announcement within a couple of weeks.[20] Various states around the country have begun the delegate selection process, including straw polls, which are attracting the attention and efforts of the major party contenders.[21] The candidates, however, are not confining their activities to those states where events are occurring prior to January 1, 1980. They and their

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1978 *Report and Order, supra* at 1091, "each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates."

[20] Philip Crane, August 2, 1978; Benjamin Fernandez, January 10, 1979; John Connally, January 24; Harold Stassen, February 21; George Bush, May 1; Robert Dole, May 14; John Anderson, June 8; Larry Pressler, September 25; Howard Baker, November 1; Edward Kennedy, November 7; Jerry Brown, November 8; Ronald Reagan, November 13; President Carter will announce on December 4.

[21] *See, e.g.*, "The Lessons of Florida," *The Washington Post*, October 15, 1979, p. A-1 (Florida had Democratic caucuses on October 13 and will have a Democratic Convention on November 16-18); "Kennedy, Carter Agree to Iowa Debate," *The Washington Post*, November 7, 1979, p. A-1 (Iowa had a Democratic straw poll on November 3 and will have a Democratic caucus on January 21, 1980); "Bush Upsets Field in Informal Ballot by the Maine GOP," *The New York Times*, Sunday, November 4, p. A-1.

representatives are traveling widely all over the country speaking to groups and trying to raise funds for their campaigns.[22] National campaign organizations have been established and are operating.[23] The Iowa caucus will result in the selection of delegates pledged to a particular candidate and, as indicated in footnote 21, *supra.*, will take place on January 21, 1980. All this campaign activity has induced public participation. Public officials and private groups are making endorsements now—even though the states in which the endorsers are located do not formally select convention delegates for many months to come.[24] Finally, it must be acknowledged that the national print media has given these campaign activities prominent coverage for almost two months.[25] In this

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[22] *See, e.g.*, "The President's Partner," *Newsweek*, November 5, cover story; "The Kennedy Challenge," *Time*, November 5, cover story; "Cosmic Candidate: Jerry Brown Runs to Protect the Earth," *The Wall Street Journal*, November 8, p. 1.

[23] *See, e.g.*, "Strauss to Chair President's Campaign," *The Washington Post*, November 6, p. A-1; "Kennedy Authorizes a Campaign and Plans Declaration for November 7," *The New York Times*, October 30, p. A-1; "Tales of a Reagan Field Organizer," *Newsweek*, November 5, p. 53.

[24] *See, e.g., The New York Times*, Friday, November 2, p. A-19 (The International Union of Electrical Radio and Machine Workers endorsed Kennedy); *The New York Times*, Sunday, November 4, p. E-1 (Chicago Mayor Jane Byrne endorsed Kennedy, Coordinator for Refugee Affairs Dick Clark quit the Administration to work for Kennedy, and Middle East negotiator Robert Strauss resigned to work on Carter's campaign).

[25] *See, e.g.*, footnotes 18-21, *supra. See also, The New York Times:* front-page articles on October 15, 19, 20, November 2, 5, 6, 7, 8, 9, 12, 14; *The Washington Post:* Front-page articles on October 19, 20, 24, 30, November 2, 4, 9, 11, 12, 13,

context, the only reasonable conclusion to be drawn is that the campaign is in full swing now.[26] This conclusion also supports the Committee's contention that "[i]t is unrealistic even to suggest that the Presidential electoral process leading up to the convention is merely a series of isolated, local and state matters." The Commission recognizes that the campaign in question is for a *national* and not just a local office and that the primaries in effect determine the outcome of the convention in that the delegates are bound to vote for the prevailing candidates. Accordingly, the primaries are an integral part of the national convention, and it would not be reasonable to characterize them as isolated, local events. Thus, as the complainant has stated: "[w]hile the pre-convention period focuses on obtaining delegates from the various states, in reality the Presidential nominating campaigns are nationwide in scope." In view of the foregoing, we cannot find that NBC acted reasonably in concluding that a national campaign has not yet begun.

14; *The Wall Street Journal:* front-page articles in October 23, November 9; *Newsweek:* cover stories on May 2, September 25; *Time:* cover stories on September 24; *Broadcasting:* Special Report on November 5.

[26] There is evidence that the broadcast media, including the networks, have also given prominent coverage to campaign activities. ABC argues that the Commission should not rely on broadcast news coverage as a basis for finding the campaign to be in full swing. In its view, such reliance would "chill" their coverage of campaign activities. We wish to emphasize that our conclusion regarding the level of campaign activity here *is not* dependent on broadcast news coverage. The level of campaign activity, as shown above, reflects facts that exist independently of any broadcaster's news judgment. Were we to hold otherwise, it would mean that a broadcaster could deny a candidate reasonable access simply by refusing to provide news coverage of a campaign.

40. "*Multiplicity of Candidates.*" The gist of NBC's "multiplicity of candidates" argument is that there are a total of 122 [27] candidates seeking the presidential nomination; and that if its refusal to sell the requested time is found to be unreasonable, absent significantly different factual situations, logic would indicate that similar access periods also be made available to legally qualified candidates for the Republican nomination.[28]

41. In our July 1978 *Report and Order, supra,* we indicated that "multiplicity of candidates" is an appropriate factor to consider in determining whether to grant access to a particular candidate. Implicit in this statement is the idea that other candidates might request simi-

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[27] It should be pointed out that not all of these candidates have qualified within the meaning of our rules. These candidates have only filed notices of candidacy with the FEC. From our previous experience, it is unlikely that more than a small percentage of these candidates will, in fact, become legally qualified candidates as defined in Section 73.1940(a).

[28] In this connection, NCCB requests that we make clear whether the networks would have an obligation to provide time to all legally qualified candidates for President regardless of party affiliation once they provide time to President Carter. We recognize that the candidate's right of access under Section 312(a)(7) may be invoked regardless of the candidate's party affiliation. This contrasts with the candidate's equal opportunities right under Section 315 which comes into play in the preconvention or prenomination phase only when another candidate of the same party affiliation has been granted access. However, our ruling today depends upon the interconnected process (caucuses and primaries culminating in a convention) described above. Where other processes are used, complaints arising under those circumstances may require different results. In any event we believe that such questions are better left to be decided on a case-by-case basis in light of the particular facts and circumstances of each case.

lar amounts of time. Accordingly, we cannot conclude that NBC acted unreasonably in considering the Republican candidates as well as the Democratic candidates in determining whether a "multiplicity of candidates" problem in fact existed.

42. However, although NBC may not have been unreasonable in considering the number of candidates for the Republican nomination, the Commission still recognizes, as the Committee has pointed out, that the networks, unlike other broadcasters, have only one group of candidates to serve—presidential candidates. Not only is it unlikely that more than a small percentage of candidates filing with the FEC will become legally qualified under our rules (footnote 27, *supra*), but it is highly improbable that all of the 122 candidates who have filed with the Federal Election Commission will have the financial resources necessary to purchase a half hour of network prime time. In this case, in fact, the committee seeks to buy time on only one network. Accordingly, we cannot find that NBC acted reasonably in determining that such a "multiplicity of candidates" existed that the sale of the requested time was not warranted.[29]

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[29] We have noted that the interplay of Sections 312(a)(7) and 315 might give rise to a multiplicity of Section 315 "equal opportunities" requests following an appearance by one candidate in a multi-candidate field on a station pursuant to a reasonable access request by that candidate. Yet in accord with a practical interpretation of the Act, under Commission policy, once a candidate has used a broadcast facility he or she is not generally entitled to another use under Section 315 following a subsequent appearance by an opposing candidate. Barring unusual circumstances, such as a particularly long period between appearances, this policy would foreclose a candidate who has already appeared on a station from receiving "equal time" as a response to an appearance by an opposing candidate pursuant to the latter's 312(a)(7) request.

43. *Programming Disruptions.* The Commission has considered program availability as a factor but has never stated that the possibility of programming disruptions will constitute sufficient justification for refusing to grant "reasonable access." [30] Indeed, this latter factor was not among those that we cited as relevant to "reasonable access" determinations in our July 1978, *Report and Order, supra.* We recognize that programming disruptions were discussed in our 1972 policy statement, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 FCC 2d 510, 536 (1972). However, that was in another context. There the Commission was discussing reasonable access requests made in the *closing days* of a campaign. Thus, we stated that:

> Congress clearly did not intend to take the extreme case that during the closing days of a campaign stations be required to accommodate requests for political time *to the exclusion of all or most* other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. (emphasis added).

While NBC emphasizes the disruptive impact of political broadcasts, we must repeat that the provision of time for such programming is an essential element of the public interest obligations of broadcasters. Especially during presidential campaigns, such broadcasts contribute toward informing the electorate on issues of public importance

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[30] In considering the availability of time factor, *Report and Order, supra,* 68 FCC 2d at 1090, we were concerned with the sale of spot announcements because of Commission policies concerning the sale of commercial time. *See* 47 C.F.R. § 0.281 (a) (7). NBC's allegation that it has only two half-hour weekly series provides no support for NBC's refusal to sell time to the Committee.

to the nation. These are concerns of importance to be weighed by us and broadcasters when making decisions on "reasonable access."

44. In this case, the request for time was made far in advance of the closing days of the campaign and nearly two months prior to the broadcast date. Furthermore, as the Committee has stated, "it gave the networks considerable leeway in providing availabilities" in that it listed four alternative dates for the broadcast, and we recognize that the networks in fact make frequent scheduling changes for their own commercial purposes. Accordingly, we cannot conclude that NBC acted reasonably in determining that the potential for programming disruptions was so substantial that it was justified in refusing to make the requested time available.

45. In light of the foregoing, the reasons given by NBC to support its decision are deficient when subjected to our test of reasonableness. On the basis of the information provided, NBC's refusal to sell any time at this point in the campaign amounts to the type of "arbitrary, 'blanket' ban" that was deemed to be unreasonable in our July 1978 *Report and Order, supra.* Accordingly, we cannot conclude that NBC was reasonable in refusing access to a presidential candidate, and we must find that its policy fails to comply with the requirement of Section 312(a)(7).

46. *ABC.* ABC, like NBC, failed to give any consideration to the needs of the candidate in reaching its decision. In essence, it bases its decision on the same three reasons relied upon by NBC, that is timing, "multiplicity of candidates," and programming disruptions. As stated above, we believe that these reasons are deficient.

47. The Commission recognizes that ABC has stated that it will sell time to candidates for the presidential nomination beginning with the first week in January

1980. However, ABC has provided no satisfactory explanation to support its decision in formulating its policy with respect to political sales. This omission is especially glaring in light of the compelling conclusion that the national presidential campaign is already in full swing. On the basis of the information that has been provided, and the analysis set out more fully in connection with NBC, we are unable to find that ABC acted reasonably in affording Federal candidates access to its facilities and must find that it has failed to fulfill its obligations under Section 312(a)(7).

48. *CBS.* The gist of CBS' response, like those of the other networks is that its refusal to sell the 30 minutes of requested time is reasonable in light of three factors: (a) timing, (2) "multiplicity of candidates" and (3) programming disruptions. For the reasons stated in our discussion of NBC's response, we cannot find that these reasons are sufficient to justify a blanket refusal to sell the time; nor can we find that these reasons are sufficient to justify CBS' policy of limiting its sales to candidates to five-minute segments.[31] CBS has provided no information to show that it gave any consideration to the candidate's desires as to the best method of conducting his media campaign. Indeed, it appears that long before it received the Committee's request, CBS established a policy of not selling more than five-minute segments.[32] This

[31] It should be stressed that we are not suggesting that five-minute segments do not contribute to the fulfillment of a networks' reasonable access obligations to presidential candidates; and that our ruling that such a segment is not sufficient is limited to the facts and circumstances of the particular case before us.

[32] On page 25 of its comments, CBS indicates that it has adopted a uniform policy of selling five-minute programs to candidates "during this pre-primary phase." Although the date on which this policy was adopted has not been specified,

policy might be reasonable under some circumstances. But here, CBS has ignored the complainant's statements that the time offered is "totally insufficient" in amount to present the "detailed and thoughtful" picture of the administration's record envisioned by the Committee, and that "[t]his purpose could not be accomplished later." [33] Thus, it has failed to comply with the mandate of our July 1978 *Report and Order*, *supra*, that "[a] Federal candidate's decision as to the best method of pursuing his media campaign should be honored as much as possible under the *reasonable* limits imposed by the licensee" (emphasis added). We find this failure especially unfortunate here. The presidency is our highest public office and the only one which networks must accommodate in selling time on a nationwide basis. In this context, the offer of a five-minute program segment appears to be an unreasonable response to the particular request here. Even if all 13 major party candidates were entitled to equal treatment, CBS' policy would result in the sale

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it appears that it was sometime in September prior to the Committee's request. As early as September 14, CBS received a request for a half-hour period, five five-minute programs and a fifteen minute program from John Connally and responded by offering two five-minute segments. Similarly, in response to a September 21 request for a half-hour for Ronald Reagan, CBS offered two five-minute segments. In light of the fact that CBS responded to the Connally request in the same manner as it responded to the Reagan and Carter requests, despite the fact that different amounts of time were requested, it would appear that it adopted a uniform policy with respect to political sales sometime in September.

[33] We emphasize that the networks should, in the circumstances presented here, give consideration to the nature of the candidate's request. In particular, here the candidate expressed a desire to set forth at the outset of a national campaign a comprehensive statement of views and to establish a framework for the organization and issues in the campaign.

of only 65 prime time minutes—a total of miniscule proportions when it is realized that there are approximately 5400 minutes available in prime time in a single month. Accordingly, in view of its failure to provide an adequate explanation, we cannot find that CBS has acted reasonably in affording Federal candidates access to its facilities and must find that it has acted in violation of Section 312(a)(7).

49. In light of the foregoing, we find that the networks acted unreasonably in discharging the obligations imposed upon them by Section 312(a)(7) of the Communications Act.[34]

50. Accordingly, each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obigations on or before November 26, 1979.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[34] The Commission has the obligation to accommodate the potentially conflicting concerns of the public, the broadcasters and the candidates. In interpreting Section 312(a)(7), as well as Section 315, we will make every attempt to do so in an equitable and practical manner. We would, however, remind all parties to these matters of what we said in 1972 in *Use of Broadcast and Cablecast Facilities*, 34 FCC 2d at 536:

> One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations. Such conferences might cover, among other things the subjects of the amount of time that the station proposes to sell or give candidates, the amount and types of its other programming, the seven-day rule, and the amount of advertising it proposes to sell to commercial advertisers.

In short we believe that good faith negotiations are to be preferred and urge that course.

SEPARATE STATEMENT OF CHARLES D. FERRIS, CHAIRMAN AND COMMISSIONER JOSEPH R. FOGARTY

Finding the moment in time when a candlidate for federal office becomes entitled to "reasonable access" under Section 312(a)(7) of the Communications Act to purchase time from broadcasters to address the public is especially difficult. What is paramount to this determination is the public interest in an informed electorate.

In evaluating that interest, today's order attaches deference on this question to the judgments of candidates themselves, as well as to the judgments of broadcasters. In doing so, we do not imply that the great deference paid to broadcaster judgments concerning news coverage of an election campaign is in any manner reduced.

We hold today only that candidates for nomination for federal office, as well as licensees, should be able to play a role in deciding when they will be able to purchase time for discussing their candidacies with the electorate. This is not a wholly new concept. We adopted an order last year specifying that candidate concerns should be weighed by broadcasters along with other factors.

Of course, a candidate's judgment as to the timing of a bid for office is not dispositive of the question of the commencement of an overall nomination or election campaign for purposes of this section of the Communications Act. For instance, an individual who announces his or her candidacy for an election several years off cannot expect to capture automatically the reasonable access rights of the statute by such unilateral action. The Commission should look to the particular conditions in existence in each case to determine whether the campaign in question is truly "in full swing."

In the Presidential context, not every campaign can be expected to have begun as early as the current one. Moreover, in making that judgment, the FCC must consider

program time availability, particularly in light of the number of candidates seeking office. But inquiry along those lines is limited. Utter denial of reasonable access for candidates because of slight disruption in programming cannot be countenanced.

The campaign for the major party nominations for the 1980 Presidential election, in our view, is "in full swing." This judgment is based on the extrinsic factors presented by the complainant in this case and those of which we have taken official notice: the number of announced candidates, the extensive organization efforts being made by candidates nationally; the commencement of delegate selection procedures in some states; and the widespread attention being paid by the print media to candidates announced and expected to announce.

It is important, however, that the Commission find that a campaign be already ongoing and not permit its determination to be the decisive factor turning an incipient campaign into a full-fledged one. Otherwise, this agency would become not merely a referee in determining some of the rules of the election contest, but the trigger pin of its starting gun as well. We believe we have avoided that danger in this case.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

"Happy Turkey Day"

Although thinly disguised as a procedural point about the completeness of network pleadings, the decision here is far reaching. It reverses the precedent that a complainant be a candidate when seeking relief from the Commission and establishes a new precedent of conditional candidacy. It creates for the first time a network obligation to provide access under Section 312(a)(7), not just equal opportunities under Section 315 of the Communications Act. It establishes an obligation for national access

early in a campaign for the nomination—from the time of a candidate's announcement if he is getting media attention—whether or not primaries, caucuses, or conventions are imminent in more than one or two states.

The majority's analysis suggests that we should think about a national primary or caucus. But, that isn't how the system works. The contest for delegates to the nominating convention and supporters for a candidate is still carried out in each of the states. There is no national time schedule and no common election day at this point in the campaign. Months separate the critical decisions to be made in the various states. While people may be curious about events across the country, this curiosity does not create a national right to access to network time. It simply suggests a topic for network news coverage.

Because of the differences in timing among the various states, stations in these states do not have a uniform access obligation under Section 312(a)(7). Indeed, at this point most stations in the country could properly reject a request for access or could decide not to clear a network campaign program. Nationwide access to the individual stations as a matter of right is simply premature. Yet, the majority finds that networks, which it treats as agents of their affiliates for political broadcast purposes, have an access obligation most of their affiliates do not have. The Commission should not impose an obligation on the agents which it cannot directly impose on the affiliates.

This is not analogous to our treatment of networks under Section 315 where we expect networks to make equal opportunities available once they have offered access. The reason is simple. When a network has offered access, each station carrying the campaign program has an obligation to provide equal opportunities. However, if an opposing candidate has to seek access to each separate affiliate, he will be placed at an extreme disadvantage.

To prevent possible abuses, we have said that a network offering access must also offer equal opportunities. The decision about when to offer the first access has been left with the networks—until today.

I appreciate the majority's contention that this decision is really a narrow procedural one which requires the networks to consider the Carter-Mondale campaign needs. However, in making the procedural point this decision leaves no doubt about the range of the networks' discretion. They may negotiate details of timing. They may not exercise their legitimate editorial judgment by rejecting the access request because of its prematurity. In my opinion this decision is a serious abuse of the Commission's discretion.

I dissent.

DISSENTING STATEMENT OF
COMMISSIONER ABBOTT WASHBURN

The campaign Committee asked for time in early December. ABC has offered to make the requested time available in early January. So what is involved is a 30-day delay. Should the FCC require the networks to accede to the December timetable under Section 312 (a) (7), the "reasonable access" section of the statute? The January offer, in my judgment, is not unreasonable.

Contrary to the result reached by the majority in today's action, the facts and circumstances of the case compel the conclusion that the January offer *is* "reasonable access" under the statute. The public would receive eight months of political advertising during the pre-convention period; and the public and the candidates could look forward to another heavy dose during the post-convention months. From January until the election in November is a long political "season"—more than long enough to serve the public interest in an informed electorate.

Nor do the equities in the case favor the Carter-Mondale complaint. Since the President, as the incumbent, can command more free time than any other candidate, he is less disadvantaged by the one-month delay than any of the other candidates. As for the other considerations, I am sympathetic to the networks' concern over the multiplicity of candidates, a factor we set ourselves. *Commission Policy in Enforcing Section 312(a)(7) of the Act.* 68 FCC 2d 1079, 1090 (1978). If the networks are required to sell political advertising to one Presidential candidate in December, they must do so for all 12 of them, if requested, regardless of party.

Aside from the impact today's decision will have on television access during the 1980 election, the majority also has established an unfortunate precedent for future presidential elections. The proposition which their decision will stand for is that the candidate's own determination of his needs is overriding. The consequences of this precedent will rise to haunt the Commission and the public in future campaigns. For example, Philip Crane announced his candidacy in August, 1978, two years before the nominating convention and twenty-seven months before the election. John Connally announced in January, 1979, George Bush and Robert Dole in May, John Anderson in June. A case could be made by their Committees that the campaign was "in full swing" last summer. Clearly, a candidate's determination that the campaign has begun should not be the determinative factor under the "reasonable access" requirement.

But of all the legal problems involved in our requiring the networks to sell time in December, the most troublesome by far is the question of the FCC's interfering with the discretion of the broadcasters and substituting our judgment for theirs. I believe we should assiduously avoid doing this unless the question of unreasonableness

is very clearcut. A one-month delay in this instance is not clearly unreasonable. Therefore I dissent.

DISSENTING STATEMENT OF COMMISSIONER ANNE P. JONES

The networks have made the relatively narrow determination that they will not sell time to the Carter-Mondale Committee on certain specified dates in December 1979. I do not believe the Commission should substitute its judgment for that of the networks absent a clear showing that the networks have acted in an unreasonable manner. In my judgment, the facts of this case provide no such showing.

STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

This complaint raises some very fundamental issues which I find particularly difficult to resolve. These issues are difficult because they require the FCC to make some very subjective judgments in the emotionally-charged atmosphere of a political campaign.

First, there is a technical question which arises out of the fact that Mr. Carter is not yet an announced candidate. It could be argued that the entire matter isn't properly before us since the request for time was not made ". . . by a legally qualified candidate for federal elective office on behalf of his candidacy." * Mr. Carter has made it clear that he intends to make a formal announcement prior to the proposed broadcast. Thus, I do not regard the lack of a formal announcement as decisionally significant under the circumstances.

On the substantive issue—whether the time requested constitutes "reasonable" access—Section 312(a)(7) provides no guidance to what is "reasonable." This matter

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* Section 312(a)(7), Communications Act of 1934 as amended.

is particularly difficult for me because I have urged—and I continue to urge—that the Congress strike Section 312(a)(7) from the statute. While I oppose it on First Amendment grounds, the matter before us also demonstrates some very practical reasons why we shouldn't be deciding matters of tactical significance to candidates. Whatever my personal philosophy might tell me about the wisdom of the statute, however, I am charged with the responsibility of enforcing it.

I can understand why the Congress elected to use the "reasonable access" language instead of something more precise. It's clear that presidential election campaigns have a dynamism all their own which does not encourage precise timetables or definitions.

My own background in broadcasting provides me with some insight into the motivations of the networks in refusing the request for time at this early stage of the campaign. First, the networks are in a very competitive struggle for ratings and politicians cannot compete with entertainment programming in drawing the largest audiences. Second, by providing access to one candidate, the networks expose themselves to the provision of Section 315 of the Communications Act which requires equal access to all opposing candidates. Thus, the networks prefer to maintain greater control over their programming options by delaying the television campaign as long as possible.

Candidates, on the other hand, are anxious to get their messages across to the electorate early and often. Presidential campaigns tend to begin earlier than in the past. I suspect that the reason for this tends to be linked to the increasing number of primaries. A decade ago, there were 17 primary elections. In the year ahead, there will be 36. That fact, alone, changes the campaign timetable. The candidate's natural response is to seek more—and earlier—access to the electorate.

Since the Congress fashioned Section 312(a)(7) with a view toward ensuring that the public would be informed about candidates for federal office, I can only assume that it mandates greater, as opposed to lesser, access than would otherwise be available if the choice were left to broadcasters. As to when such access should become effective, I am particularly concerned that the networks have arrogated into themselves the determination as to when a presidential campaign should commence. Obviously, neither the networks nor this Commission has any authority, expressed or implied, to determine unilaterally the appropriate time for commencement of a presidential campaign. For this reason, I find that NBC and ABC have failed to demonstrate the reasonableness of their respective conclusions that it is "too early" to commence a presidential campaign.

The CBS Television Network has made the judgment ". . . that the public interest does not require the preemption of extensive segments of its national program service for political broadcasts of half-hour duration." This judgment is predicated on the "unusually large number of candidates" seeking presidential nominations and the likelihood that many hours of programming will be disrupted if equal time provisions apply. While CBS asserts that the claim that there will be relatively limited demand for network half hours for presidential candidates is a claim of speculation, I find the same speculation in the *assumption* by CBS that half-hour time periods would be sought by many presidential candidates. CBS Television Network has not demonstrated a factual basis for its presumptions.

Under the circumstances, the three television networks have been unreasonable in their refusals to honor the requests of the Carter-Mondale Presidential Committee.

APPENDIX C

FCC 79-773

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE COMPLAINT OF
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

against

THE ABC, CBS & NBC TELEVISION NETWORKS

MEMORANDUM OPINION AND ORDER

(Adopted: November 28, 1979;
Released: November 28, 1979)

BY THE COMMISSION: COMMISSIONER BROWN ISSUING A SEPARATE STATEMENT; COMMISSIONERS LEE AND WASHBURN DISSENTING AND ISSUING STATEMENTS; COMMISSIONER JONES DISSENTING.

1. The Commission has before it three Petitions for Reconsideration and for Stay of its *Memorandum Opinion and Order*, FCC 79-750, released on November 21, 1979, filed by the CBS, ABC, and NBC Television Networks. Our Order found that all three networks had failed to fulfill their Section 312(a)(7) (47 USC 312(a)(7)) obligations in that their responses to a request to purchase time by the Carter-Mondale Presidential Committee, Inc. (Committee) for use by President Carter in his capacity as a candidate for the Democratic nomination were unreasonable.

I. The Pleadings

2. *Petitions for Reconsideration.* The three networks claim that their actions in response to the Committee's

request were reasonable and that reconsideration should be granted. They state that they did in fact consider the needs of the candidate in reaching their decisions and that they also considered the nature and length of the campaign, the multiplicity of candidates and the possibility of programming disruptions. They argue that they have provided the public with extensive news coverage of President Carter and that the Commission's decision may run afoul of First Amendment considerations.

3. ABC and CBS both contend that the Commission has misconstrued the purpose of Section 312(a)(7) by focusing on the needs of individual candidates, as opposed to the needs of candidates in general in an overall campaign and that a standard that requires a broadcaster to weigh the purpose of a political program is contrary to the no-censorship provision of Section 315(a) (47 USC 315(a)). Additionally, CBS and NBC both argue that the draftsmen of the 1972 Amendments to the Communications Act intended to shorten the length of the campaign period and not extend it.[1]

4. CBS claims that its decision not to sell the requested time was "an editorial decision, no different from the decisions upheld by the Supreme Court in *Columbia Broadcasting System Inc.* v. *Democratic National Committee*, 412 US 94 (1973)"; that our decision "does violence" to the statutory purpose of Section 312(a)(7) since the legislation was designed to do no more than codify existing practice[2]; that the Commission has failed to "adequately explain" its decision in *Paul A. Talmey*, 49 FCC 2d 678

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[1] To support this argument, they cite *S. Rep.* 92-96 92nd Cong., 1st Sess. (1971). CBS also refers to the terms of the "lowest unit charge" provision.

[2] In this connection it cites *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 113-14 n.12 (CBS v. DNC).

(B/c. Bur. 1976); that the Commission lacks jurisdiction to require the networks to sell time under Section 312 (a) (7); and that it has considered the needs of the candidate. Specifically, it states that it considered: (1) the Committee's desire to purchase a half-hour of time and the fact that "the only special circumstance" alluded to in the Committee's original request for time was the date of the Iowa caucus; (2) that the first primary will not be held until February 26, 1980, and that during the pre-convention period the campaigns are focused on contests in individual states; (3) the fact that the convention is scheduled for August 11, 1980; (4) the importance of treating Democratic and Republican candidates equally; (5) that the President has not yet announced his candidacy; and (6) that his formal campaign will have "barely begun" at the time of the proposed broadcast.

5. CBS asserts that in addition to considering "the situation surrounding the candidates," it has also considered other factors which it believes justify its decision. In particular, it considered that there are a "large number of announced candidates"; that the cost of a half-hour prime time program ranges from $172-186,000; that in the 1976 primaries, 15 candidates qualified for a total of more than $24.1 million in Federal matching funds; that many candidates can thus afford to purchase time; that in the past minor candidates have purchased time[3]; that disruption of its prime time programming would "unreasonably" interfere with its overall service; that its owned and operated stations will receive many requests for time from local, federal and state candidates, which may cause further interruptions; and that its past practice has not been to sell half-hour segments this early in the campaign.

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[3] In this connection, CBS refers to its initial response where it stated that in the 1976 primary campaign Ellen McCormick and Eugene McCarthy purchased program time and that Mrs. McCormick brought four five-minute segments.

6. ABC argues that the Commission has substituted its judgment for the good faith judgment of broadcasters as to when the sale of political broadcast time must commence; that the Commission has acted contrary to its prior precedent in granting a candidate "standing" while conceding that the President is not presently qualified; that our ruling that Section 312(a)(7) applies to networks is "particularly suspect" in light of our acknowledgement of the lack of congressional guidance as to the purpose of the provision; that contrary to the Commission's interpretation of Section 312(a)(7) in our July, 1978 *Report and Order*,[4] we have "drastically lengthened media coverage of federal election campaigns." ABC further argues that in the last Presidential campaign it did not sell political program time until late April; that its decision to sell time as early as January was responsive to the requests that it was receiving from Presidential candidates; that these requests obviously reflected the individual needs of the candidates making them; that by rejecting other factors such as timing, multiplicity of candidates and programming disruptions, the Commission has "failed properly to assess and weigh overall public needs and interests"; and that news and public affairs coverage should not be a "controlling" factor in deciding when to begin political sales.

7. NBC asserts that it did in fact take into account, in its initial reply to the Committee's complaint, the "needs" of candidates for the office of the President in general and Mr. Carter's expressed needs and desires in specific in assessing the Committee's request[5]; that it

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[4] *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978) (*Report and Order*).

[5] In this connection, it cites page 6 of its initial comments where it stated "[a]s will be shown below, NBC has taken into consideration the factors specified by the Commission,

weighed these considerations against other "relevant" factors including timing, the multiplicity of candidates, and the possibility of programming disruptions; and that in light of this weighing process, it denied the request.

8. *Petitions for Stay.* All three networks assert that a stay is warranted in light of the fact that in the event that reconsideration is denied, they will seek judicial review of the decision. They further assert that the decision raises substantial legal questions. ABC and CBS contend that the judicial review process cannot be concluded by November 26, 1979, the date on which the networks must inform the Commission as to how they intend to comply with Section 312(a)(7), and that there is no need for them to take immediate action on the Committee's request since the President is not yet a legally qualified candidate. ABC and NBC claim that implementation of the Commission's decision threatens substantial disruption of their programming schedules during December. Additionally, NBC claims that judicial review of the Commission's decision would be "threatened by mootness" if the Petition for Stay is denied.

9. *Opposition to Petitions for Stay.* On November 23, 1979, an Opposition to Petitions for Stay was received from the Committee. It states that the "bare allegations" made in support of the requests for stay fall "woefully short of the standards followed by . . . [the FPC] for granting a stay as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958); that no showing has been made that CBS [6] is likely to prevail on the merits of its appeal; that CBS has not even alleged that it will suffer irreparable injury in the

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and its judgment based on these factors cannot be ruled unreasonable."

[6] The Committee states that the petitions of NBC and ABC are "similarly lacking in support."

absence of a stay; that the issuance of a stay would substantially harm the interests of the complainant; that CBS has made no showing that the public interest would be served by a stay; that the Committee's allegation that its interests would be substantially harmed by a stay is supported by the attached affidavit of Gerald M. Rafshoon which demonstrates that "substantial advance planning and arrangements are necessary to utilize the time period effectively in accord with the Committee's original plans. . ."; and that the networks had ample opportunity to litigate the constitutionality and application of Section 312(a)(7) in the Commission's July 1978 inquiry into its policy in enforcing that section.

10. *Opposition of National Citizens Committee for Broadcasting (NCCB) to Networks' Petitions for Stay.* An opposition to the Petitions for Stay was also received from the NCCB on November 23, 1979. NCCB asserts that the denial of a stay would "cause no harm to any of the networks and no such harm is even alleged." It further asserts that "the superior rights of the public to be exposed to information would be severely and irreparably harmed if the stay were granted.

11. *Opposition to Petitions and Requests for Reconsideration.* On November 24, 1979, the Committee filed an Opposition to Petitions and Requests for Reconsideration. The Committee asserts that the networks have raised no new arguments or facts that require the Commission to revisit its Order; that the petitions are essentially "*ex post facto* rationalizations of arbitrary prior decisions, fashioned to meet points raised during the Commission's . . . open meeting and in the MO&O"; that the networks' claims that they considered the needs of the candidate are "clearly unsupportable" in light of the facts already in the record; and that "[e]ven now the networks' refusals are not responsive to the factors described in the Commission's [July 1978, *Report and Order, supra.*]"

12. Citing CBS' claim that its refusal to sell the time is the type of "editorial decision" supported by the Supreme Court in *CBS* v. *DNC*, 412 US 94 (1973), the Committee asserts that the case has "no direct bearing on the application of Section 312(a)(7)" in that the case dealt with the Fairness Doctrine. It further asserts that the footnote in *CBS* v. *DNC*, *supra*, relied on by CBS is not "significant." As to CBS' contention that Congress expressed a desire to limit campaigns, the Committee points out that Congress rejected a proposal to limit the length of campaigns. The Committee argues that ABC's concern that the Commission has too deeply involved itself in determining when campaigns begin is "specious"; and that *Paul A. Talmey*, *supra*, which was cited by CBS is "not on point."

13. Regarding CBS' contention that the Commission lacks jurisdiction to apply Section 312(a)(7) to networks, the Committee claims that "it is inconceivable that Congress would have exempted [networks] from access obligations when it adopted Section 312(a)(7)." The Committee also addresses CBS' argument that Section 312(a)(7) violates the First Amendment and asserts that "[t]his argument fails to appreciate the fundamental fact that it is the public's First Amendment rights that are paramount."

14. *Reply to Opposition to Petitions for Stay.* A reply to Opposition to Petitions for Stay was received from CBS on November 26, 1979. CBS states that this case presents substantial questions; that it believes that it has "established a strong likelihood of prevailing on the merits"; that the Committee has failed to establish that it would suffer significant injury if a stay were granted; that CBS would suffer irreparable injury if a stay were not granted in view of the fact that the loss of First Amendment rights is "irremedial"; and that the public interest would "clearly" be injured if CBS were com-

pelled to sell program time to the Committee when the Congressional purpose [of Section 312(a)(7)] require[s] deference to CBS' editorial judgment.

15. *Petition for Reconsideration and Comments in Support of Motions for Stay.* On November 26, 1979, the National Association of Broadcasters (NAB) filed a Petition for Reconsideration and Comments in Support of Motions for Stay. It claims that the Commission's Order articulates a policy that bases a determination of "reasonable access" on the "needs" of particular Federal candidates; that under this policy licensees would be unable to exercise the discretion afforded to them by Congress; that the Commission asserts that networks act as "agents" for their affiliated stations; that in attempting to establish jurisdiction over the networks, the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees; that the Commission has established a new principle of "conditional candidacy"; that "[t]his decision means that henceforth every licensee must accept the claim of any person that he or she is about to become a candidate"; and that "[i]n reliance upon that claim, the Commission would require each licensee to sell at least thirty minutes of time per day to that individual."

Discussion

II. Legislative History

16. CBS argues that the legislative history of Section 312 shows that the legislation was "designed to do no more than codify existing practice" and cites *CBS* v. *DNC*, 412 U.S. at 113-14 n. 12 to support its argument. It also cites the Senate Report accompanying the bill containing Section 312(a)(7) and the terms of the "lowest unit charge" provision for the proposition that Congress intended to shorten the length of political campaigns.

17. We are not persuaded by CBS' argument that Section 312(a)(7) was merely meant to "codify existing practice." We considered and disposed of that argument in our July 1978 *Report and Order*, *supra*, where we stated that:

> We see no merit to the contention that Section 312 (a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. Moreover, Congress limited the applicability of the "reasonable access" provision to candidates for Federal elective office. The Commission's policy made no specific distinction between those candidates and candidates for state and local office. Therefore, it seems clear that Congress was creating a different, additional obligation which was to apply only to Federal candidates.

68 FCC 2d at 1088.

18. This interpretation is consistent with the intent of the drafters. CBS has presented no new or additional evidence that would warrant a departure from this construction of the statute. The only authority cited by CBS to support its argument is a footnote in *CBS* v. *DNC*, *supra.*, at 113-14 n. 12. Although we recognize that the Court's footnote states that Section 312(a)(7) "essentially codified the Commission's prior interpretation of § 315(a)," we do not believe that this statement should be controlling in a consideration of the legislative intent in enacting Section 312(a)(7). The footnote in question was merely a "laundry list" of the amendments to Section 315 that were adopted between 1934 and 1973. It appears that the statement in question was an attempt to summarize the terms of the "reasonable access" provision and was not meant to resolve the issue of whether Section 312(a)(7) was intended to impose new obligations

on broadcasters. That question was not before the Court; and the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it.[7] Thus, we find no reason to believe that our interpretation of Section 312(a)(7) as stated in our July 1978 *Report and Order, supra.*, was erroneous.

19. Our July 1978 *Report and Order, supra.*, also considered and disposed of the argument that the terms of the "lowest unit charge" provision and the Senate Report accompanying Section 312(a)(7) demonstrate that Congress intended to shorten the length of political campaigns. There we stated that:

> Although Congress may have wished to encourage candidates to concentrate their campaigning [on the 45 day period prior to a primary and 60 day period period prior to an election], there is nothing to indicate that it intended to *require* candidates to so limit their campaigns.

68 FCC 2d at 1091, n. 21.[8] In the absence of any new or additional information to the contrary, we continue to believe that Congress did not intend to *require* candidates to limit their campaigns to the 45 and 60 day periods and that it is quite possible that a presidential campaign may be in full swing a year before the election.

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[7] It is well-established that such interpretations are normally accorded substantial deference by reviewing courts. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[8] It is clear that we considered both authorities cited by the complainant herein. The Senate Report cited by CBS was quoted at page 1083 of the July, 1978, *Report and Order, supra.*, while the "lowest unit charge" provision was discussed at page 1091.

III. Commission Precedent

20. CBS contends in its petition that we have failed to "adequately explain" our "departure" from *Paul A. Talmey, supra.* The circumstances surrounding that decision differed substantially from those of the instant case. The *Talmey* case involved a Congressional race and not a presidential campaign. Moreover, the licensee there did agree to sell a half hour in prime-time and the gravamen of the complaint was that it had refused to sell a particular program length in a particular portion of prime time. For these reasons, we believe that the *Talmey* case is distinguishable on the facts and that it has little if any bearing on our consideration of the instant matter.

21. Regarding the Committee's failure, pursuant to Section 73.1940(a) to show that the President has qualified, ABC asserts that "in granting candidate 'standing' in this case . . . the Commission has acted contrary to prior practice and established a potentially troublesome precedent affecting its administration of all political broadcasting matters." [9] Our prior decision disposed of any argument relating to our past practices and we do not believe that it is necessary to reiterate our reasoning herein. As to the assertion that our decision will lead to future administrative problems, ABC has not identified

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[9] We note that the NAB argues that the portion of our ruling relating to the President's fulfillment of the requirements of Section 73.1940(a) means that we "would require each licensee to sell at least thirty minutes of time per day" to every person that claims that he is "about to become a candidate for Federal office." This statement ignores the clear language of our ruling which specifically states that "if the President is not a legally qualified candidate nationwide at the time of the broadast, the networks need not honor [his] request for time." Moreover, we never stated, or even implied, that "reasonable access" requires that any candidate be sold "at least thirty minutes of time per day."

specific problems and we believe that the benefits [10] to be gained by the approach followed in our ruling far outweigh any administrative burdens that may result.

IV. Jurisdictional and First Amendment Arguments

22. CBS claims that Section 312(a)(7) does not apply to networks and that the Section, as interpreted in this case, violates the First Amendment. However, CBS has presented no new or additional information to show that Section 312(a)(7) was not intended to apply to networks and we see no reason for reversing our ruling that the "reasonable access" provision applies to the networks. As explained in our previous order, that conclusion is consistent with the legislative intent in enacting Section 312(a)(7).

23. ABC contends in its pleading that the Commission's finding that the "reasonable access" provision applies to networks is "particularly suspect in light of both the plain language of the statutory provision and the Commission's prior acknowledgement of the absence of any meaningful congressional guidance as to the specific purpose of Section 312(a)(7)." We believe that our prior ruling fully considered and disposed of any argument that the language of Section 312(a)(7) indicates that it was not intended to apply to networks. We also believe

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[10] In our *Memorandum Opinion and Order* at 12, we noted that the delay that could result in the event that the networks could wait until the President had qualified before ruling on the request, might make it impossible for a candidate to obtain Commission relief in time to fulfill his plan of using his reasonable access rights promptly. We also noted that even if the networks were otherwise inclined to grant access, the last-minute scheduling disruption which would result from postponing the request and response until the legal qualification process was technically completed, might tend to discourage a grant of access.

that ABC's argument that the lack of congressional guidance renders our ruling "suspect" is without merit. Despite the fact that Congress gave us little guidance as to its intent in enacting the statute, the Commission still has a statutory obligation to enforce the provision and in that connection we must make judgments consistent with established interpretation of closely related provisions in Section 315.

24. The NAB also questions the propriety of that portion of our order that held that Section 312(a)(7) applies to networks. Citing our statement that "[i]n view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312(a)(7)," the NAB asserts that "the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees." It further asserts that "the Commission's enforcement of Section 312(a)(7), through the networks ignores the differing circumstances that are likely to exist at differing stations, such as the amounts of political time being sold by these stations locally to the same and other candidates."

25. The NAB has taken the above cited statement from our Order out of context, afforded it undue weight, and thus missed the essence of our ruling. Our ruling only held that a complaint addressed to a network would constitute a sufficient basis for a ruling in a Section 312(a)(7) matter in view of the considerable difficulties that a contrary ruling would present to presidential candidates seeking national access. In that connection, we noted that network licensees do, in fact, hold themselves out as a unit for sale of time generally and that it would thus appear that they would have little basis to argue that Section 312(a)(7) should not be applied to them as a unit.

26. Moreover, our ruling does not necessarily require any affiliate to broadcast political programming offered to it by the network. It would naturally be appropriate for each affiliate to consider its own particular situation, in the context of its own obligations to afford "reasonable access" pursuant to the statute, in determining whether to carry the network program.

27. As to CBS' assertions regarding the constitutionality of Section 312(a)(7), we refer to our July, 1978, *Report and Order, supra.*, where we refused to take a position on the constitutionality of the provision in light of our belief that:

> [S]uch issues are for the courts and Congress to resolve. The Commission's authority extends to the interpretations of statutes which Congress has enacted. [68 FCC 2d at 1094]

We believe that this is a sound, well reasoned approach and we therefore will continue to refrain from attempting to determine the constitutionality of the statute. Nevertheless, as we noted in Paragraph 35 of our *Memorandum Opinion and Order*, we recognize that our decision concerns First Amendment interests—both of the general public and broadcast journalists. We have, we believe interpreted the statute to effectuate the Congress' intent while not unnecessarily impinging on broadcasters' journalistic discretion.

V. Reasonable Access

28. ABC's argument that our ruling amounted to a substitution of our judgment for that of the licensee is not persuasive. Although we do afford deference to the licensee's discretion in "reasonable access" cases, the basic determination as to whether Section 312(a)(7) obligations have been satisfied must be made by the Commission. In reviewing ABC's response to the Carter-Mondale complaint, we concluded for reasons fully outlined in

the *Memorandum Opinion and Order* that ABC had been unreasonable in concluding that the campaign was not in full swing. In reviewing the ABC threshold determination that it was too early to sell time here, we evaluated both ABC's own assessment as well as the candidate's own showing in his complaint. Contrary to ABC's assertion, our decision as to the reasonableness of the timing of the candidate's segment was not based on the candidate's own appraisal of the status of the campaign. We did, however, find unreasonable ABC's position that the upcoming caucuses and primaries were merely of local, not national, significance. The Commission's determination on this threshold issue was based on its own independent evaluation of the status of the campaign taking into account the position of the candidate and the networks as well as other factors. *See* Paragraph 39 of the Memorandum Opinion and Order. We do not believe that such a determination by the Commission as to the threshold matter of timeliness of requests—based on both the broadcaster's and the candidate's perspective—impairs in any respect, or is inconsistent with affording deference to, broadcaster discretion. Neither broadcasters nor candidates bring a perspective of total objectivity as to questions of the initial applicability of Section 312(a)(7). Such questions may well have an inherently more objective character to them than other Section 312(a)(7) issues relating to amounts of time, scheduling or timing which arise after an initial determination on complaint that it is not too early for Section 312(a)(7) obligations to attach. Thus, we believe that a refusal on our part to make such basic determinations as to whether any rights attach under Section 312(a)(7) would amount to an abdication of our statutory obligation to ensure that licensees fulfill their Section 312(a)(7) responsibilities.

29. Our prior *Memorandum Opinion and Order* also stressed the significant role that the needs and desires

of the particular candidate must play in evaluating "reasonable access" requests. While recognizing that this factor was not paramount, we stated that:

> A Federal candidate's decision as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee.

Memorandum Opinion and Order, supra., at page 14 *quoting Report and Order, supra* at 1090.[11] In light of the networks' apparent failure to give any consideration to the candidate's needs and desires, we concluded that they had failed to fulfill their Section 312(a)(7) obligations.

30. Despite the clear mandate of our decision, CBS now argues that "Section 312 was designed to apply equally to candidates similarly siguated, and the desire of one particular candidate to present his views in a particular format should not affect the reasonableness of a licensee's determination that it is too early in the campaign to begin selling time. . . ." We believe that our discussion above fully disposes of CBS' contention that it was reasonable for it to conclude that it was "too early" in the campaign to begin political sales. As to CBS' contention that Section 312 was designed to apply equally to candidates similarly situated, we also reject that notion to the extent that it implies that broadcasters need not consider the merits of each individual request with which they are presented. However, we do recognize that our original Order may not have fully explained the manner in which we expect licensees to weigh individual requests for reasonable access. In light of the importance of this issue, we will take this opportunity to clarify that aspect of our Order.

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[11] Similar references to candidates' needs appear in the *Report and Order, supra.*, n.14 at 1089 and ¶ 40 at 1090.

31. In carrying out their Section 312(a)(7) obligations, we expect that the broadcaster will weigh each request in its own specific context on a particularized basis. Thus, we expect that, in weighing considerations countervailing to the particular request, the broadcaster will not rely on merely generalized assertions about the number of potential multiple requests for time but will attempt to appraise their actual likelihood at each stage of a campaign. In this connection, we think it entirely appropriate that the broadcaster contact the candidates at the outset and at various stages during the campaign to determine the probability of access requests by such candidates.

32. We wish, moreover, to clarify how a broadcaster might evaluate individual candidate requests. For example, we do believe that a broadcaster can reasonably consider such factors as the number, individual lengths, total time, and timing of access opportunities previously made available to a particular candidate. While we certainly do not wish to encourage broadcasters to limit arbitrarily the amount of time available to any one candidate, we do believe that, in acting on access requests, the broadcaster may take account of the number of "uses" previously obtained by a particular candidate.[12] Thus, if a candidate has had numerous recent access opportunities on a particular station or network, we believe that the station or network might be less accommodating in offering time than it might be in the case of a candidate who had not previously purchased any time. Conversely, at the beginning of a campaign when a can-

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[12] For reasons outlined herein we do not believe that broadcasters may reasonably consider the amount of coverage afforded to a candidate in programming exempt from Section 315. See para. 38. Section 312(a)(7), like Section 315(a), contemplates "use" by the candidate; news coverage is no substitute for such "uses."

didate has not previously made any requests for time, no such weighing of an individual candidate's other access opportunities can be undertaken; and necessarily in this respect the candidate's initial request of a campaign carries an air of reasonableness to it. Indeed, we specifically note, and rely on the fact that the case before us involves just such an initial request for time.

33. In addition, on reconsideration, we believe that we should more precisely delineate how the specific nature or purpose of a particular candidate's request should be weighed. We specifically eschew any intention of requiring broadcasters to make an assessment of individual candidate "needs" insofar as they solely relate to the candidate's subjective, personal, or immediate "political" desires. We do not intend to place broadcasters in the position of evaluating the "political" importance or urgency of individual candidate needs in terms of a particular candidate's situation in a campaign, e.g., where he stands in the polls or how he has fared in specific primaries. However, we have specifically noted that a broadcaster should not "second guess" the "political" wisdom or relative audience-attracting effectiveness of longer versus shorter formats in determining the "reasonableness" of a candidate's request. Such judgments, we concluded in our 1978 *Report and Order*, are best left to the discretion of the candidate and his media adviser. 68 FCC 2d at 1089 n. 14. Moreover, we shall look with concern upon evidence that broadcasters have not demonstrated proper restraint in evaluating the candidate's request. As noted below, CBS apparently seems to have evaluated the particular request before it in this improper manner.[13] *See* Para. 50 below.

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[13] CBS' statements indicate that it has simply substituted its political judgment for that of the candidate and his media adviser. *See* its Petition at 4-6 reciting the needs considered. Since, however, CBS apparently concluded it was "reasonable"

34. We recognize, of course, that the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate. Other public interest factors, such as the disruption or displacement of regular programming (particularly as affected by a reasonable probability of requests by other candidates), must be considered in the balance. In this overall weighing process, we nevertheless believe that a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime. For example, a candidate might request an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests. In our view Section 312(a)(7)'s goal of encouraging electorate-informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request. In this case, we found in our original *Memorandum Opinion and Order* and have reaffirmed on reconsideration that CBS made no effort to explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request. CBS provided no explanation as to how two such short segments could afford enough time for a discussion

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to sell five-minute slots, its explanation apparently goes to the "wisdom" of the candidate's need for longer blocks of time. It notes, for example, that the average audience for five-minute segments is higher than that for thirty-minute segments. Likewise, its extended discussion of the early stage of the campaign implies, in view of its decision to sell *some* time, its own independent judgment of the effectiveness of buying at this time *longer* segments of time. Such an approach by CBS seems squarely inconsistent with its obligation to honor "as much as possible" a candidate's decision as to "the best method of pursuing his media campaign."

of subjects as broad as those the candidate intends to discuss. Similarly, ABC's decision not to make any time available for sale to presidential candidates before January 1980 was unresponsive to the candidate's expressed purpose of using the broadcast time near the time of his announcement of candidacy in December to make a comprehensive statement of the candidate's position and record which "could not be accomplished later." In this general respect, we believe that consideration of the nature and purpose of the individual candidate's request—and, in that sense, of his needs—is appropriate and indeed consistent with the goals of Section 312(a)(7).

35. Finally, in emphasizing that a broadcaster should take into account the individual request of each candidate not just "candidate needs" in general, we do not mean to suggest that the latter factor is an improper or irrelevant one for the broadcaster to consider. We have simply found that it was unreasonable only to consider candidate needs generally and to ignore the individual candidate's needs and requests in applying Section 312(a)(7).

36. Although CBS argues that "[i]n any event, [it] has considered the needs of the candidate," we cannot find that it has presented sufficient evidence to warrant a reversal of our ruling. The factors that CBS has allegedly considered are: (1) the Committee's desire to purchase a half hour of time; (2) the date of the Iowa caucus; (3) the average audience for five-minute political programs in the last decade was 67% greater than the audience for half-hour programs; (4) the nature and length of the presidential election process; (5) the importance of treating all candidates equally; and (6) the fact that the President's campaign will have barely begun at the time of the broadcast. CBS states that consideration has also been given to the "large number" of candidates; that many candidates can afford to buy time;

that the sale of the requested program would "unreasonably interfere with its overall service"; and that its past practice has not been to sell half-hour segments this early in the campaign. Thus, CBS essentially reiterates the three arguments relating to timing, multiplicity of candidates, and programming disruptions that it made in its original comments.[14] For the reasons stated in our Order, we believe that its explanation for refusing the candidate's request was not reasonable.

37. Two remaining points raised by CBS are worthy of comment. First, CBS states that it was not appropriate for it to consider the contents of the proffered program. We recognize that we have long held that Section 315(a) prohibits a licensee from reviewing the contents of a candidate's broadcast on any basis relating to censorship.[15] We believe that our ruling in the instant matter is in no way contrary to this policy. Our ruling only states that due consideration must be given to the nature of the candidate's *request* and the *purpose* of the program as described in the request. We never directed any licensee to review the contents of any program; nor did we state that the contents of any program would be a relevant consideration in evaluating a request for reasonable access.

38. CBS also states that President Carter has had a "substantial opportunity for the presentation of his views" on the CBS Television Network in that it has

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[14] In essence, CBS attempts to provide a *post hoc* explanation for its original refusal of the candidate's request. In this respect, it simply attempts to recast reasons previously provided and to show that, in weighing factors such as timing and programming disruptions, it was in fact evaluating the candidate's needs.

[15] *Law of Political Broadcasting and Cablecasting*, 69 FCC 2d at 2209, 2269-71.

broadcast four presidential addresses and that he has made 52 appearances on news programs. To the extent that this argument implies that Section 312(a)(7) obligations may be fulfilled through the broadcast of programming which is exempt from Section 315, it is contrary to the interpretation that we gave to Section 312 (a)(7) in our July 1978, *Report and Order*, *supra*. There we concluded that Section 312(a)(7) would be rendered meaningless were we to interpret it to mean that the obligation to afford access could be satisfied by the type of news programming that is exempt from Section 315 considerations. Thus, the fact that the President may have appeared on exempt news programming is not relevant to our determination of this matter.

39. In its Petition for Reconsideration, ABC simply asserts, as do the other networks, that the Commission has relied on an improper standard by requiring individual candidates' needs to be weighed. Because we believe this to be the proper standard for reasons outlined in the *Memorandum Opinion and Order*, *supra.*, and in paragraphs 31-35 above, and because ABC has apparently not considered such needs, we reaffirm our conclusion that ABC's reasons for refusing to provide the requested time were unreasonable.[16] We likewise find that the other

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[16] In this case, ABC has not alleged that it considered the individual candidate's request or the purpose of the proffered program. ABC only states that its decision to start selling time as early as January 1, 1980, was responsive to the requests received and that these requests "obviously reflected the individual needs of the candidates making them." It would therefore appear that ABC considered all of the requests as a group in setting its policy. Thus, it apparently considered only candidate needs in general; and no consideration was given to the particular nature of each specific request. *See* paragraphs 31-35 above for a full explanation of the deficiency of this approach.

contentions raised by ABC have no merit.[17]

40. NBC also essentially argues that it considered President Carter's "expressed 'needs' and 'desires' as to the method of conducting his . . . media campaign" and weighed these considerations against other relevant factors including the timing of the broadcast relative to the overall nomination, the possibility of programming disruptions, the multiplicity of candidates and the "extensive coverage" afforded to the President in news programming. For the reasons fully explained in our ruling, and the foregoing discussion in Paragraph 28 herein, we do not believe that it was reasonable for NBC to conclude that the "timing" of the broadcast relative to the

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[17] We also note that ABC's Petition for Reconsideration improperly characterizes our decision as holding that the needs of the candidate are the only consideration in applying Section 312(a)(7). While we believe that the needs of a candidate constitute a significant factor and are entitled to significant weight, we recognize that other factors are relevant in making reasonable access determinations. *See* paragraphs 31-35 above and 42-52 below. ABC argues in addition that our ruling is contrary to our July 1978 *Report and Order, supra.*, in that it "drastically" lengthens political campaigns. This argument is contrary to the plain language of the July 1978 *Report and Order, supra.* Although we stated there that "reasonable access" obligations would attach at least during the periods when the "lowest unit charge" provision is applicable, we never stated that the operation of Section 312(a)(7) would be *limited* to those periods. Rather, we clearly explained that cases involving requests made prior to those periods would be decided on a case-by-case basis and we recognized that a presidential campaign may be in full swing even a year before the election. ABC also implies that our ruling "suggest[s] that news and public affairs coverage of the campaign is a controlling factor in deciding when to begin political sales." However, our ruling unambiguously holds to the contrary. *Memorandum Opinion and Order, supra.*, at 18 n.26.

convention was such that the denial of the request was warranted; nor do we believe that it was reasonable for NBC to determine that such a multiplicity of candidates [18] existed that its refusal to afford the time was justified. Furthermore, our ruling fully disposed of the contention that the possibility of programming disruptions in this case was so real and substantial that it was not necessary to honor the request. Moreover, as stated in our discussion of CBS' Petition for Reconsideration, we do not believe that news coverage of the President's activities is relevant to an evaluation of a "reasonable access" request.

41. Thus, we cannot find that any of the factors that NBC "weighed" against the needs of the candidate are persuasive. Neither NBC's original response nor its Petition articulate any adequate basis for its decision. In particular, in its Petition, NBC merely asserts in conclusory terms it has weighed all relevant factors; [19] but it has totally failed to articulate how it reached its result. We cannot uphold as reasonable a judgment which is so lacking in explanation.[20] Accordingly, the Commission still cannot find that NBC has acted reasonably.

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[18] We recognize that NBC also asserts that "the requirements of Section 315" was a factor employed in its weighing process. However, it would appear that this factor is just part and parcel of the multiplicity of candidates argument which we considered fully in our *Memorandum Opinion and Order, supra.*, at 20 n.29.

[19] Like ABC and CBS, NBC essentially contests the Commission's reliance on any standard which requires an evaluation of individual candidate needs.

[20] *See Greater Boston Television Corp.* v. *FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).

V. Summary

42. In conclusion, then, we reiterate the basis for our original decision and our decision here on reconsideration. Section 312(a)(7) involves a delicate balancing of competing First Amendment related concerns—assuring the independence of journalistic discretion, affording increased opportunities for political discussion and "uses" of broadcast time by candidates, and informing the electorate on issues of public importance. Neither the statute nor its legislative history afford the Commission with precise guidance on how to accommodate these potentially conflicting concerns.

43. We believe that Section 312(a)(7) cannot, however, be implemented reasonably if either the interests of broadcasters or candidates are allowed to become preeminent. For, if we accord controlling weight to candidate's needs and interests, there is a serious potential for impinging unduly on broadcaster discretion. At the same time, if we interpret the statute so as to afford broadcasters essentially unlimited discretion with respect to access issues, the needs of candidates and of the electorate may be given short shrift. This would be contrary to what we believe was the Congress' clear intent in adopting Section 312(a)(7) to safeguard those vital interests.

44. Thus, we believe that essential to enforcement of Section 312(a)(7) are the dual notions of deference to broadcaster discretion and broadcaster accountability. Such accountability implies that the Commission must review the exercise of broadcaster discretion and find unreasonable decision which fail to effectuate the purpose of Section 312(a)(7). However, deference to broadcaster judgment implies that in carrying out our responsibilities under Section 312(a)(7) we will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments under Section 312(a)(7).

45. In implementing Section 312(a)(7), we have shied away in the past from prescribing specific guidelines. *Report and Order, supra.*, 68 FCC 2d at 1089. We concluded, however, in our July 1978 *Report and Order* that we could specify some of the relevant criteria that should be evaluated in making judgments under the statute. The various criteria of timing, multiplicity of candidates and the needs of the candidates have been fully discussed in our original Order and here on reconsideration. Most of these factors relate primarily to broadcasters' needs. By requiring consideration of the needs of the candidates, we have required broadcasters to weigh a countervailing factor in the balance. We have not prescribed exactly what weight this factor has among the others except as noted before, the candidate's decision as to "the best method of pursuing his media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee." *Report and Order, supra.*, 68 FCC 2d at 1090. Thus, a broadcaster continues to have substantial leeway as to the amount, timing, and scheduling of "uses of airtime by a candidate."

46. By requiring that individual needs be considered in such a manner as set forth in paragraphs 31-35 above, we do not, of course, intend broadcasters to evaluate or censor the individual program since such conduct is foreclosed by Section 315. We do expect, however, that broadcasters will consider the particular nature of the request made so that "as much as possible" and "within reasonable limits" airtime will be responsive to the candidate's needs. We are concerned however, about merely "blanket determinations", such as appear to have been made here, of candidate's needs in general. Such a standard could too easily allow decisions based on broadcaster's own convenience or economic interest to be couched in terms of amorphously defined candidate needs. We note as an example of that, ABC's attempt here to justify its flat

refusal to offer time until January 1, 1980. See paragraph 39, n. 14 above. Requiring a specific—rather than blanket—response to individual requests provides greater assurance, we believe, that candidate's interests cannot be ignored in the balancing process.

47. We have attempted to implement Section 312(a)(7) by requiring, in response to a complaint, a full explanation of a broadcaster's decision. Requiring a full explanation is, moreover, essential to assuring that we do give careful consideration, and appropriate deference, to a broadcaster's discretion.[21] We must deal essentially with the broadcaster's own reasoning—not generally with resons we might have relied on. Beginning our analysis with the broadcaster's reasons and according them deference is not the same as considering that judgment unreviewable. It means we are confined in the process

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[21] As we noted in our discussion herein, we also believe that threshold questions as to when Section 312(a)(7) rights and obligations attach are susceptible to more "objective" analysis than decisions about amounts of time and scheduling. In that area, as we noted above, we have weighed both the complainant's and the broadcaster's showings; and we have tried to identify some independent indicia as to whether a campaign is underway and, therefore, it is not premature for Section 312(a)(7) to apply. We do not regard this as an unreasonable way of resolving this threshold matter; and we do not regard our original *Memorandum Opinion and Order* as substantially impairing broadcaster discretion any more than had we determined in our 1978 *Report and Order, supra.*, to establish some prescribed period for Section 312(a)(7) access. There, we concluded that any such fixed period for applying Section 312(a)(7) would not take into account differences among individual campaigns or among Presidential and other elections for federal offices. Indeed, we specifically anticipated there that Presidential campaigns could begin as much as a year before the general election. *1978 Report and Order, supra.*, 68 FCC 2d at 1091.

of review by the broadcaster's own reasoning. But in like measure it means that the broadcaster is confined by his own explanation. The reasonableness of his conduct must stand or fall on his own analysis.

48. It has been within this framework that we have approached our review of the three networks' responses to the Carter-Mondale complaint. In our original Order, and now on reconsideration, we have reaffirmed that each of the three networks has failed to consider one of the relevant factors, individual candidate needs, under Section 312(a)(7). Each of the networks fundamentally contests our reliance on this standard adopted in our 1978 *Report and Order*. We have twice now rejected their contentions and have found, therefore, their determinations based on an improper standard to be unreasonable.

49. At least one of the networks, NBC, while disputing the reasonableness of the individual needs test, asserts on reconsideration that it has evaluated this and other factors. We have rejected this conclusory assertion essentially on the ground that NBC has merely recited relevant factors without any explanation of how it applied those factors in this case. CBS has also disputed the relevance of the individual candidate needs test; yet it has discussed the "needs of a candidate." We find its explanation on this point unreasonable and arbitrary. For in spite of its apparent conclusion that it was not too early to sell five-minute slots to the candidate, CBS appears to assert it is too early or somehow unwise for the candidate to purchase a longer time period. Based on our review of CBS' own explanation of its position, we do not believe its decision reflects a good faith attempt to consider as much as possible the candidate's decisions about his own media strategy. *See* paragraph 33 above.

50. In our original Memorandum Opinion and Order, we found and now reaffirm that it is not premature for

Section 312(a)(7) rights and obligations attach. As to the two networks that concluded not to sell any time, we reaffirm that their determination that the campaign was not underway is unreasonable. NBC has apparently adopted no general policy, but is simply refusing to sell time at this point. ABC appears to have adopted a blanket policy of refusing to sell time to presidential candidates until January 1980, which, in view of our determination about the state of the campaign is unreasonable. This policy, moreover, precludes the consideration of individual requests on the ground that the network is obliged only to consider the "general needs" of candidates—not the needs reflected in any particular candidate's request to purchase time. For reasons outlined above, we believe that such a policy is unreasonable.

51. We have further concluded that all three networks claims of multiple candidate requests are an unreasonable basis at this time for refusing to sell time to the candidate. We concluded that, in spite of the theoretically large number of candidate requests, not all candidates appear likely to request time in response to the candidate's request here. Moreover, not all candidates are likely to request time on each of the networks. And none of the networks have here asserted that there are other—or contingent—requests for half-hour purchases now pending before them. Thus, the claims of disruption of scheduling and multiple requests are speculative and unsubstantiated at best. Furthermore, the candidate here has taken steps to minimize the potential for last minute disruptions by requesting time two months in advance. The alleged disruption involves programming, moreover, which by its general nature informs the electorate on issues of public importance. Weighed against these speculative claims of injury is the networks' clear and admitted refusal to offer time responsive to the individual candidate's request. The candidate here had made no previous requests for time, and his request specified a

format permitting more extended exposition than possible in a five-minute request. In view of these facts and the merely speculative likelihood of multiple requests and after weighing all these factors, we believe that we must find that the networks have acted unreasonably in carrying out their obligations under Section 312(a)(7). In view of the foregoing, all of the petitions for reconsideration are denied.

VII. Petitions For Stay

52. Each of the networks has also requested a stay of the November 21, 1979, order pending reconsideration and, if reconsideration is denied, pending judicial review. The Carter-Mondale Committee and NCCB have opposed the stay requests. For the reasons set forth below, we find no basis to stay the requirement of the November 21 Order, as amended by our action today, pending judicial review.[22]

53. The Commission has adopted generally the same standards for considering stay motions as employed by the courts in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1959), and *Washington Metro. Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). *See, e.g., Cable TV Pole Attachment Regulations*, 73 FCC 2d 1 (1979). These standards basically involve an assessment of whether the movant has made a substantial case on the merits in light of a balancing of the equities revealed in showings of irreparable injury, harm to the public and harm to others in the absence of a stay.

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[22] Insofar as we have established November 29, 1979, as the date for the networks to demonstrate the steps that they intend to take to fulfill their Section 312(a)(7) obligations (see Paragraph 59 below) we are only in this limited respect modifying our November 21 Order.

54. In this situation, the equities weigh overwhelmingly against granting a stay. CBS has made no effort to demonstrate any injury, irreparable or otherwise, which it would face in the absence of a stay. ABC and NBC merely rely on vague and generalized references to program disruption. It is clear that none of the networks would suffer any injury if the stay is not granted.[23]

55. On the other hand, the Cater-Mondale Committee has made a substantial showing that it would be harmed if the Commission were to stay its action. The Committee explains in its Opposition and in an accompanying affidavit of Gerald M. Rafshoon, who is responsible for the production and placement of advertising for the Committee, that the requests, which were made nearly two months in advance of the broadcast dates requested planned to have the broadcast coincide as closely as possible with the President's formal announcement of candidacy on December 4, that that announcement cannot be postponed, and that substantial advance planning is necessary to utilize the time period effectively. Mr. Rafshoon's affidavit states:

> [T]he purpose of the program in question is to inaugurate, and set the tone for, the official and formally announced portion of the President's campaign by describing the record of his Administration and the case for a second term in a thoughtful and complete manner. Thus, to achieve its central purpose, it must appear as close as possible to the President's planned announcement of candidacy on December 4, 1979. At least one week's lead time is required to

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[23] NCCB points out that "[n]ews events of many kinds, sports programs and many of [the networks'] own special entertainment programs disrupt schedules", and we agree with NCCB's conclusion that the alleged harm "is neither serious nor irreparable, especially where paid programming is involved."

promote this program properly in order to inform the public of its showing and to assure an adequate viewing audience.

The affidavit also points out that since early October, the Committee has been recruiting individuals across the country to hold small fund raisers in their homes during the week of the announcement with the "key" to the planning and promotion of these events being the presentation of the program for which time has been sought. It is the Committee's intention to have 2,000 homes participating in these events and that it would be impossible to implement this program successfully if the television time is not available. The Committee has made a substantial showing that it would be harmed irreparably if our Order were stayed.

56. Moreover, the clear policy of Section 312(a)(7) is that the public interest is served by ensuring that voters have access to candidate's messages through broadcast stations. In this regard, there would certainly be some harm to the public if the networks' stay requests were granted.

57. Since the equities balance so heavily against granting a stay, a very strong showing on the merits would be required to justify granting the motions. The networks have not presented a sufficiently compelling case on the merits to override the strong weighing of equities in favor of denying the requests for a stay. We recognize that this is an important decision, that it reflects the first occasion in which the Commission has considered when Section 312(a)(7)'s obligations attach in presidential campaigns, and that Section 312(a)(7) has never been subjected to judicial review. However, none of these factors reduces the networks' burden to present a very strong case on the merits to overcome the substantial equities militating against grant of a stay. The discussion at paragraphs 16-52 above makes clear our con-

clusion that the networks have fallen far short of presenting such a substantial case. The requests for stay are therefore denied.

VIII. Conclusion

58. The three networks have now had two opportunities to justify their refusal to offer the requested time. Continued delay by them threatens to moot the candidate's complaint now before us. Our standards in this area were made explicit in our 1978 *Report and Order, supra.*, and in our *Memorandum Opinion and Order.* We recognize that the three networks intended to seek immediate judicial review of our decision denying reconsideration and stay. If a judicial stay is not obtained, we will expect that they will forthwith meet their Section 312(a)(7) obligations. We instruct them to inform us by the close of business November 29, 1979, of how they intend to meet their Section 312(a)(7) obligations. In assessing that response we will be obliged to consider the extent to which their conduct reflects a further failure to meet obligations which have been substantially and clearly defined. We shall then decide what, if any, specific measures may be required to remedy any continued failure to comply with Section 312(a)(7).

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

SEPARATE STATEMENT OF COMMISSIONER TYRONE BROWN

I voted with and joined in the opinion of the Commission majority which found that in this case the three commercial television networks have not met their "reasonable access" obligations under Section 312(a)(7). I now vote to deny reconsideration, although I believe it has been beneficial that the petitions for reconsideration

have given the Commission this opportunity to amplify its original *Order*.

I.

The pleadings of the networks in support of reconsideration suggested to me that they have misconstrued the intent of the original *Order* because language therein could be interpreted as giving total control to the candidates on the questions of whether and when they would receive broadcast time under Section 312(a)(7). The *Order* we issue today makes it clear that we do not intend, through our subjective processes, to second guess broadcasters' subjective assessments of political candidates' subjective determinations of their own needs. Rather, we are only requiring broadcasters to fairly balance their interests against the needs and desires of the candidates in responding to particular requests for access.

The expanded discussion in today's *Order*, describing some of the factors broadcasters reasonably can take into account, and emphasizing the irrelevancy of the candidate's subjective views of why he or she needs the time, helps to clear up any confusion about the Commission's intent. Ultimately, because cases such as this one turn on their particular facts, I have been concerned that we not reach beyond the facts before us to make general pronouncements which may not withstand the test of time. I believe we have now avoided that temptation.

I recognize that the positions of CBS and ABC have surface appeal. Responding to the Carter-Mondale Committee request for a 30-minute prime time availability on one of four specified days in early December, ABC offered an indefinite amount of program time in January and CBS offered two five-minute segments—one during prime time—on any one of the requested December dates. Nonetheless, in my judgment, in addition to NBC's "un-

reasonableness" [1] in failing to make any time available, the responses of CBS and ABC were unreasonable within the intendment of the statute.

Our *Orders* properly focus initially on the argument of ABC and NBC that, given the mid-August 1980 date of the Democratic National Convention, an early December 1979 date is too soon for the reasonable access provision to come into play. The fallacy in the networks' argument is that they fail to recognize that, at least after enactment of Section 312(a)(7),[2] such a determination is left neither to the sole judgment of the broadcaster nor to the sole judgment of the candidate.

There are *objective* indicia of when a political campaign—from the perspective of the electorate—is actively underway. Undisputed facts set forth in the Commission's original *Order*, at paragraph 39, fully support our conclusion that the 1980 Democratic presidential nomination campaign is sufficiently underway to trigger application of Section 312(a)(7). In this regard, I consider it particularly relevant that the formal process leading to selection of delegated to the Convention has begun in Florida and will begin in Iowa on January 21. Both of these events have captured substantial national attention (*Order*, par. 39 & n. 21); they are part of the continuum of formal steps leading to the Convention it-

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[1] It is unfortunate that judgments made by the networks in this case must be characterized as either "reasonable" or "unreasonable." In this connection, see my response to Commissioner Jones' dissenting opinion below.

[2] This case involves interpretations of a statute whose only direct beneficiaries are candidates for Federal elective offices. The Commission properly has not considered whether its holding extends to candidates for non-Federal offices under the general public interest standard.

self. The Commission did not create this factual situation, but neither we nor the networks can ignore it.

I attach particular significance to the ongoing nature of the formal delegate selection process, and to the extent of national focus on that process, because these are relatively objective measures of whether the presidential nomination campaign is sufficiently underway to implicate Section 312(a)(7). Considering these objective factors and the others cited in the original Commission *Order*, we clearly were correct in our holding on the timing issue.

As I read that part of our original decision, we have not given undue weight to subjective judgments of the candidates. To the contrary, we have held only that subjective judgments by the networks that it is "too early" to permit paid political programs cannot prevail in the face of unmistakable objective indicia that the campaign is in fact well underway.

Our holding that the 1980 Democratic nomination campaign is actively underway also goes a long way toward resolving the issue of the reasonableness of the ABC and CBS responses to the Carter-Mondale Committee. CBS argues not that December is too early for paid political programs, but that December is too early for such programs of greater than five minutes' duration. Phrased most favorably to the networks, CBS argues that, balancing all relevant factors, its decision to offer five-minute program slots in response to the request of the Carter-Mondale Committee discharged its obligation under Section 312(a)(7). Apparently, as Convention time nears, CBS will be prepared to permit purchase of longer segments of time.

In what respect, if any, is the CBS response unreasonable? In the first place, as the Commission's original *Order*, at paragraph 31, indicates, just last year we

stated unanimously that "an arbitrary 'blanket' ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable." 68 FCC 2d at 1090 (1978). In the second place, as that *Order* also recognizes, this general principle gives us guidance not answers. For answers, we must analyze the facts.

For me, in addition to the factors discussed in our *Orders*, one overriding fact that begs for attention in the negotiation between CBS and the Carter-Mondale Committee is that the request for broadcast time at issue represents the Committee's *first* request to the networks for a substantial segment of program time. If Section 312(a)(7) has any meaning at all, it must mean that, once a campaign is actively underway, and reasonable access rights have attached, broadcasters must be responsive to the *first* request for a substantial segment of program time on behalf of a candidacy, unless there are compelling reasons for not honoring the request.

To respond appropriately to a request for paid time under Section 312(a)(7), the broadcaster must weigh, on one hand, the factors that favor a positive response and, on the other hand, those that mitigate against such a response. However, normally, as in this case, when the broadcaster is presented with a timely *first* request, there will be few (if any) valid reasons (such as multiplicity of recent requests by the same candidate, or the lateness of the request, or the *actuality* of a host of requests from many candidates) to deny the *first* request. I would expect the equities to favor granting access.

Here, neither in its original pleadings nor in its Petition for Reconsideration has CBS cited compelling reasons for not honoring this first Carter-Mondale Committee request for 30 minutes of program time. Similarly, in declining to afford program time until January, ABC was unresponsive to a first request of the Carter-Mondale

Committee for a substantial segment of program time. ABC provides no compelling reason to justify its rejection of the request. On these facts, the Commission has no choice but to find that the ABC response, like the CBS response, was unreasonable.

II.

Commissioner Jones dissented from our original *Order* on the ground that we should not overturn the judgments of the networks, absent "a clear showing" that they have acted unreasonably. I read in Commissioner Jones' statement a conviction that this is a very close case and, in the interest of broadcaster discretion, close cases should be resolved in favor of the broadcaster.

I agree with Commissioner Jones that, if we must err in resolving close *factual* questions under Section 312(a)(7), it should be on the side of broadcaster discretion. However, the issues that here sharply divide the Commission are more legal than factual.

In our original *Order*, the principal issue was whether, and to what extent, broadcasters must address each candidate's particular request rather than taking a blanket approach in responding to reasonable access requests. These are preeminently legal issues; they involve legal interpretation of Section 312(a)(7). Under the additional approach I have suggested herein, the issue is whether broadcasters, without compelling reasons, may deny a first request for a substantial segment of broadcast time after the campaign, as an objective matter, is actively underway. This issue also is a legal interpretive one. And, even the issue of how to determine objectively whether a campaign is actively in progress is a mixed one of law and fact.

Resolution of legal issues, particularly when we must attempt to strike a delicate balance among important

competing interests, often involves very close calls. Congress assigned to this Commission the role of initially making the legal judgments necessary to fill in the details of Section 312(a)(7). We should not surrender this interpretive role in the name of broadcaster discretion.

Were we here considering a situation in which a candidate (having obtained broadcast time reasonably responsive to the first request) was seeking additional time, I would in a close case be prepared to consider arguments about broadcaster discretion. I fail to see how an unresponsive reaction to a *first* request for broadcast time (when, as here, there is nothing concrete and substantial to weigh on the broadcaster's side of the scale) can be said to comply with the requirement of reasonable access.

III.

The networks argue that the potential for "disruption of [their] program service" [3] was a factor which weighed heavily in their decisions to refuse the Carter-Mondale Committee's request. They based the likelihood of disruption on speculation as to the number of candidates who would seek time if the Carter-Mondale Committee's request were granted. This concern was recognized in the Commission's original *Order* in this case,[4] where we addressed the argument and refused to accede to the networks' view. I consider our response to be sound, and I hold to our conclusion that mere speculation about programming disruption cannot justify the networks' negative responses.

I note, for example, that in its Petition for Reconsideration, NBC states that:

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[3] CBS Inc. Petition for Reconsideration at 9; NBC Petition for Reconsideration at 4 note * ; Petition for Reconsideration of American Broadcasting Companies, Inc. at 10.

[4] *Order* at pars. 42-44.

> "[A] candidate may obtain Section 315 time and then seek time of his own under the reasonable access requirements of Section 312(a)(7). Given the weight the Commission would seem to attach to a candidate's own 'needs' and 'desires,' it might prove improper to decline to honor such request; the grant of such time would, of course, set in motion an entirely new round of equal time requests." [5]

We specifically addressed this concern in our original *Order*, indicating that NBC's concern is not a valid one.[6] There we recognized the interplay of Sections 312(a)(7) and 315 and we emphasized our ability and willingness to interpret and apply those provisions in a practical and equitable manner in order to avoid programming disruptions contrary to the public interest.

Other Commission procedures may alleviate the networks' concern in this regard. For example, a network facing practical problems complying with "access" or "equal opportunities" requests might apply to the Commission for a waiver of the Prime Time Access Rule to permit the broadcast of political programming during the "access" period. Without passing on the merits of such a request in the abstract, I believe the foregoing demonstrates that the Commission possesses adequate means to respond in a practical way to valid concerns of the networks over program disruption.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

"Quo Vadis"

I have listened carefully to my colleagues explain how this decision leaves broadcast discretion with the networks. However, the decision doesn't have this effect. By

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[5] NBC Petition for Reconsideration at 5, note *.

[6] *Order* at n.29.

the time the majority finishes its analysis of the networks' reasons for not giving time,[1] the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority.

Under this decision presumably any one or more of the candidates could order all three networks to sell prime time at the same time on the same date. Unless affiliates refuse to carry the programs, almost all of our citizens would have no choice about what to watch if they want to watch TV. This certainly creates the appearance of government control over programming with all of the potential evils we have enunciated in numerous opinions. On the other hand, if the candidate really only wants one network in spite of the obligation we have placed on all networks, how is this choice made? "Lucky Louie" will take a beating in the ratings to the enrichment of the other two, or we (the State) will have to make the choice. Traditionally the licensee makes a decision within our rules to carry a political broadcast. Here, the State makes the decision that triggers other responsibilities under Section 315 of the Act.

It has been my experience that, when a case is this close, it is the better part of valor not to disturb the *status quo*. This decision turns it upside down on what, I believe, are questionable grounds.

I dissent.

DISSENTING STATEMENT OF
COMMISSIONER ABBOTT WASHBURN

Today's *Memorandum Opinion and Order* recites the litany: "We believe Section 312(a)(7) cannot, however, be implemented reasonably if either the interests of broad-

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[1] I found that these reasons thoughtfully included consideration of the needs of candidates, the public, and the networks.

casters or candidates are allowed to become preeminent." But having stressed the importance of this "delicate balance" between the two interests, the item goes on to establish a heavily weighted balance in favor of the needs of the candidates. Broadcasters are admonished to "honor as much as possible the candidate's decisions about his own media strategy". (See page 19, paragraph 50.) This new approach is inconsistent with the Commission's 1978 *Report and Order*, which set out the candidate's needs as only one of several factors to be considered, not *the* uppermost factor. Elevating the importance of candidate's needs also destroys the delicate balance between assuring broadcasters' independence of journalistic discretion, affording increased opportunities for political discussion by candidates, and informing the electorate.

In addition, the document adopted by the majority today goes far beyond the proper limits of Commission responsibility in political broadcasting matters. In detail (see pages 12-13, paragraphs 31-35) it substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such governmental intrusion is unwarranted, is illegal and, I fear, will have far-reaching consequences that will come back to haunt the Commission and the public again and again.

I dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-2403

[Filed May 15, 1980]

CBS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents

And Consolidated Case Nos. 79-2406 and 79-2407

Before: Bazelon, Senior Circuit Judge; Tamm, Circuit Judge; and Markey *, Chief Judge, United States Court of Customs and Patent Appeals

ORDER

Upon consideration of the petitions for rehearing filed herein by the National Association of Broadcasters, the American Broadcasting Companies, Inc., and the National Broadcasting Company, Inc., it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

---

* Sitting by designation pursuant to Title 28 U.S.C. 293(a).

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-2403

[Filed May 15, 1980]

CBS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents

And Consolidated Case Nos. 79-2406 and 79-2407

Before: Wright, Chief Judge; Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestions for rehearing *en banc* filed by the National Association of Broadcasters, the American Broadcasting Companies, Inc., and the National Broadcasting Company, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforementioned suggestions for rehearing *en banc* are denied,

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-1023

CBS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 11, 1980.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 4 day of June, 1980.

APPENDIX G

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 312(a)(7) of the Communications Act, as amended, 47 U.S.C. § 312(a)(7), provides:

"§ 312. *Administrative Sanctions—Revocation of Station License or Construction Permit*

(a) The Commission may revoke any station license or construction permit—

. . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Section 315 of the Act, 47 U.S.C. § 315, provides:

"§ 315. *Candidates for public office.*

(a) *Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities*

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have

no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) *Broadcast media rates*

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary run-off election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof."

Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

NATIONAL BROADCASTING COMPANY, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

(List of counsel on inside cover)

PETITIONS FOR CERTIORARI FILED AUGUST 11 AND 13, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioner National Broadcasting Co., Inc.

December 18, 1980

WADE H. MCCREE, JR.
Solicitor General
LOUIS F. CLAIBORNE
STEPHEN M. SHAPIRO
Department of Justice
Washington, D.C. 20530
(202) 633-2217
ROBERT R. BRUCE
General Counsel
DANIEL M. ARMSTRONG, III
Associate General Counsel
C. GREY PASH, JR.
LISA B. MARGOLIS
Attorneys
Federal Communications Commission
Washington, D.C. 20554

Counsel for the Federal Respondents

JOHN D. LANE
RAMSEY L. WOODWORTH
HEDRICK AND LANE
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 628-5923

Counsel for Respondent Carter/Mondale Presidential Committee, Inc.

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I

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

CBS Inc. v. *FCC*

No. 79-2403

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	28	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	28	Petitioner's motion for stay and for expedited consideration on the merits
	28	Petitioner's motion for expedited consideration of motion for stay and for expedited consideration on the merits
	29	Petitioners' (ABC, CBS, NBC) motion for leave to file appendix in lieu of joint appendix
	29	Respondent's (FCC) opposition to motions for stay and for expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of this Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb and Wilkey (who did not participate), CJs
	30	Motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	4	FCC's motion to consolidate with Nos. 79-2406 and 79-2407
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 and 79-2407 are consolidated
	5	Clerk's order granting the motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	7	Clerk's order granting the motions of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling or argument
	7	Intervenor's response to motion for stay and expedited consideration
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per curiam order granting the motion to adopt expedited briefing schedule as follows: petitioner's and supporting intervenors—Dec. 7th, Respondent's and supporting intervenors—Dec. 18th and reply briefs—Dec. 21st. petitioners and supporting intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and supporting intervenors shall sub-

DATE		FILINGS—PROCEEDINGS
1979		
		mit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30th, 1980; Tamm, Robb, CJs and Wilkey, CJ (who did not participate)
Dec.	7	Petitioner's brief
	7	Intervenor's (National Assoc. of Broadcasters) brief
	12	Clerk's order granting the motion of the National Broadcasting Co. for leave to file brief in excess of page limitation
	13	Petitioner's motion for allotment of time for oral argument and for leave to permit three counsel per side to argue
	17	Petitioner's memorandum concerning the question of mootness
	18	Motion of Stewart Rawlings Mott et al. for leave to participate as amicus curiae and to participate in oral argument
	18	Motion of National Citizens Committee for Broadcasting, for leave to participate in oral argument
	18	Memorandum of Carter-Mondale Presidential Committee, Inc. on question of mootness
	18	Petitioner's (NBC, Inc.) brief
	18	Intervenor's (Carter-Mondale Presidential Committee, Inc.) brief
	19	FCC's motion for leave to file typewritten briefs, pending printing

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	19	FCC's motion for leave to file brief in excess of page limitations
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired
	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness
	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present oral argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
	21	Petitioner's reply brief
	26	Petitioner's (NBC, Inc.) reply brief
	27	Clerk's order granting respondents' motion to accept late brief and in excess page limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of National Citizens Committee for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix

DATE		FILINGS—PROCEEDINGS
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon
	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestions for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter-Mondale) conditional consent to grant of petitioners' Motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	18	Petitioners' motion for leave to file petition for rehearing exceeding page limitations
	22	Per Curiam order granting petitioner's motion to extend time and file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and Markey, CJ, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
May	15	Per Curiam order, en banc denying petitioner's motion for leave to exceed page limitations and the Clerk is directed to return the lodged copies of the petition for rehearing and/or suggestion for rehearing en banc to counsel for CBS Inc.; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva, and Edwards, CJ's

DATE		FILINGS—PROCEEDINGS
1980		
May	15	Per Curiam order denying the petitions for rehearing filed by NAB, ABC and NBC; SCJ Bazelon, Tamm, CJ and Markey, Chief Judge, U.S. Court of Customs and Patent Appeals
	15	Per Curiam order en banc denying the suggestions for rehearing filed by NAB, ABC and NBC; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva & Edwards, CJ's
Jun.	5	Copy of letter from Clerk, Supreme Court extending the time to file petition for writ of certiorari to August 11, 1980 in S.C. No. A-1023
Aug.	13	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-207 on August 11, 1980
Nov.	5	Certified copy order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-207 on November 3, 1980; consolidating with SC Nos. 80-213 and 80-214 and allotting one hour for oral argument

II

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

American Broadcasting Companies, Inc. v. *FCC*

No. 79-2406

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	28	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	28	Petitioner's motion for expedited consideration and for temporary stay
	29	Respondent's (FCC) opposition to motions for stay and for expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of this Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb & Wilkey (who did not participate), CJs
	30	Motion of Carter-Mondale Presidential Committee, Inc. for leave to intervene
Dec.	4	FCC's motion to consolidate with Nos. 79-2403 and 79-2407
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 & 79-2407 are consolidated

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	5	Clerk's order granting the motion of National Association of Broadcasters for leave to intervene
	5	Clerk's order granting the motion of Carter/Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	5	Intervenor's (Nat'l Assoc. of Broadcasters) response to motion for stay and expedited consideration
	7	Clerk's order granting the motions of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting, et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling of argument
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per Curiam order granting the motion to adopt expedited briefing schedule as follows: Petitioner's and supporting intervenor's—Dec. 7th, Respondent's and supporting intervenors—Dec. 18th and Reply Briefs—Dec. 21st. Petitioners and supporting intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and supporting intervenors shall submit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30, 1980; Tamm, Robb, CJ's and Wilkey (who did not participate)

DATE		FILINGS—PROCEEDINGS
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	19	FCC's motion for leave to file typewritten briefs, pending printing
	19	FCC's motion for leave to file brief in excess of page limitations
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired
	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
	21	Petitioner's reply brief
	26	Petitioner's (NBC, Inc.) reply brief
	27	Clerk's order granting respondent's motions to accept late brief and in excess of limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of Nat'l Citizens Comm. for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon

DATE		FILINGS—PROCEEDINGS
1980		
Mar.	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestion for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter/Mondale) conditional consent to grant of petitioners' motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	22	Per Curiam order granting petitioners' motion to extend time to file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
	22	Petitioner's petition for rehearing and suggestion for rehearing en banc
May	15	Per Curiam order en banc denying petitioner's (CBS) motion for leave to exceed page limit and the Clerk is directed to return the lodged petition for rehearing and suggestion en banc to petitioner; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva and Edwards, CJ's
	15	Per Curiam order denying the petitions of NAB, ABC & NBC for rehearing; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals

DATE	FILINGS—PROCEEDINGS
1980	
May 15	Per Curiam order en banc denying the suggestions of NAB, ABC & NBC for rehearing en banc; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva & Edwards, CJ's
Aug. 18	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-213 on August 13, 1980
Nov. 5	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-213 on November 3, 1980; consolidating with Nos. 80-207 and 80-214; and allotting one hour for oral argument

III

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

National Broadcasting Company, Inc. v. *FCC*

No. 79-2407

DOCKET ENTRIES

DATE		FILINGS—PROCEEDINGS
1979		
Nov.	29	Petitioner's petition for review of an order of the FCC
	29	Certified copy of petition for review was mailed to the FCC & Attorney General
	29	Petitioner's motion for an expedited appeal, a stay and expedited consideration
	29	FCC's opposition to motions for stay and expedited consideration
	29	Motion of National Association of Broadcasters for leave to intervene
	29	Motion of National Citizens Committee for Broadcasting for leave to participate as amicus curiae
	29	Per Curiam order that the motion for stay is granted until further order of the Court and that because of the obvious complexity of the issues involved and the need of this Court to receive full and complete briefing, the consideration of the motion to expedite is deferred until the parties agree upon a briefing schedule to be submitted to the Court; Tamm, Robb & Wilkey (who did not participate) CJs
	30	Motion of Carter/Mondale Presidential Committee, Inc., for leave to intervene
Dec.	4	FCC's motion to consolidate with Nos. 79-2403 and 79-2406
	4	FCC's motion to adopt expedited briefing schedule
	4	Certified Index to Record
	5	Clerk's order, sua sponte, that Nos. 79-2403, 79-2406 & 79-2407 are consolidated

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DATE		FILINGS—PROCEEDINGS
1979		
Dec.	5	Clerk's order granting the motion of Carter/ Mondale Presidential Committee, Inc. for leave to intervene
	5	Intervenor's (Carter/Mondale) opposition to motion for stay
	7	Clerk's order granting the motion of National Association of Broadcasters for leave to intervene and the motion of National Citizens Committee for Broadcasting, et al. for leave to participate as amicus curiae. The request to participate in oral argument is denied without prejudice to resubmission at such time as counsel is notified of the scheduling of argument.
	7	Intervenor's response to motion for stay and expedited consideration
	7	Amicus Curiae opposition to motion for stay and expedited consideration
	7	Per Curiam order granting the motion to adopt expedited briefing schedule as follows: petitioner's and supporting intervenors—Dec. 7th, respondent's and supporting intervenors—Dec. 18th, and reply briefs—Dec. 21st. Petitioners and intervenors shall submit memoranda on or before Dec. 17th addressed to the question of mootness. Respondents and intervenors shall submit separate memoranda addressed to the same question along with their briefs on Dec. 18th. All parties on the same side are directed to file joint briefs wherever possible. These cases will be heard at oral argument during the period January 1-30th, 1980; Tamm, Robb, CJ's and Wilkey, CJ (who did not participate)

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	7	Petitioner's motion for leave to file brief exceeding page limitations
	7	Intervenor's (National Assoc. of Broadcasters) brief
	12	Clerk's order granting petitioner's motion to file brief exceeding page limitations
	12	Petitioner's brief
	13	Petitioner's motion for allotment of time for oral argument and for leave to permit three counsel per side to argue
	17	Petitioner's memorandum concerning the question of mootness
	18	Motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to participate in oral argument
	18	Motion of National Citizens Committee for Broadcasting, for leave to participate in oral argument
	18	Memorandum of Carter-Mondale Presidential Committee, Inc. on question of mootness
	18	Intervenor's (Carter-Mondale Presidential Committee, Inc.) brief
	18	Petitioner's (NBC, Inc.) brief
	19	FCC's motion for leave to file typewritten briefs, pending printing
	19	FCC's motion for leave to file brief in excess of page limitation
	19	FCC's motion for leave to file memorandum on question of mootness, time having expired

DATE		FILINGS—PROCEEDINGS
1979		
Dec.	21	Clerk's order granting respondents' motion to accept late memorandum on the question of mootness
	21	Respondents' memorandum on the question of mootness
	21	Clerk's order denying petitioners' motion for allotment of 45 minutes to present oral argument and the following times are allotted for oral argument: petitioners—30 minutes and respondents—30 minutes. The motion for leave to permit three counsel per side to argue is granted
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	27	Clerk's order granting respondent's motion to file late brief and in excess page limitations
	27	Respondent's brief
	27	Respondent's brief
	27	Clerk's order granting the motion of Stewart Rawlings Mott, et al. for leave to participate as amicus curiae and to adopt brief and denying the motion of Nat'l Citizens Comm. for Broadcasting, et al. for leave to participate in oral argument
	27	Amicus Curiae (Nat'l Citizens and Stewart Rawlings, etc.) brief
	28	Clerk's order granting petitioner's motion to file appendix in lieu of joint appendix
	28	Petitioner's appendix
1980		
Jan.	10	Argued before SCJ Bazelon, Tamm*, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals

DATE		FILINGS—PROCEEDINGS
1980		
Mar.	14	Opinion for the Court filed by Senior Circuit Judge Bazelon
	14	Concurring opinion filed by Circuit Judge Tamm
	14	Judgment that the orders of the FCC under review herein are hereby affirmed, in accordance with the opinion for the Court filed herein
	26	Petitioners' motion to extend time to file petitions for rehearing and suggestions for rehearing en banc to April 18, 1980
	27	Intervenor's (Carter/Mondale) conditional consent to grant of petitioners' motion to extend time
	28	Petitioners' reply to intervenor's conditional consent
Apr.	22	Per Curiam order granting petitioner's motion to extend time to file petition for rehearing to April 21, 1980; SCJ Bazelon, Tamm, CJ and CJ Markey, U.S. Court of Customs and Patent Appeals
	22	Intervenor's (NAB) petition for rehearing
	22	Petitioner's petition for rehearing and suggestion for rehearing en banc
May	15	Per Curiam order en banc denying petitioner's (CBS) motion for leave to exceed page limit and directing Clerk to return the lodged petition for rehearing and suggestion en banc to counsel for petitioner; CJ Wright, Tamm, Robinson, MacKinnon (who would grant leave to exceed page limits), Robb, Wilkey, Wald, Mikva & Edwards, CJ's
	15	Per Curiam order denying the petitions of NAB, ABC, & NBC for rehearing; SCJ Bazelon, Tamm, CJ and Markey, Chief Judge, U.S. Court of Customs and Patent Appeals

DATE	FILINGS—PROCEEDINGS
1980	
May 15	Per Curiam order denying the suggestions for rehearing en banc of NAB, ABC & NBC; CJ Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, CJ's
Aug. 15	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-214 on August 13, 1980
Nov. 5	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-214 on November 3, 1980; consolidating with SC Nos. 80-207 and 80-213; and allotting one hour for oral argument

IV

RELEVANT PLEADINGS BEFORE AND ORDER OF FEDERAL COMMUNICATIONS COMMISSION

in

Carter-Mondale Presidential Committee, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

ABC Television Network

CBS Television Network

NBC Television Network

To: *The Commission*

COMPLAINT

The Carter-Mondale Presidential Committee, Inc. (hereinafter the "Committee"), herewith files a political broadcasting complaint against the three television networks, ABC, CBS, and NBC, for their refusal to sell one half-hour time period to be used by the President in his capacity as a candidate for renomination by the Democratic Party for the office of President of the United States. This refusal effectively denies the candidate and his campaign committee reasonable access to the citizenry of this country via our only national commercial television network system. Furthermore, it has been reported that two candidates for the other party's nomination are also being foreclosed from utilizing the system by what is rapidly becoming a common pattern of abuse of power. This conduct of selling exclusively to commercial advertisers denies these important candidates the access to the airways mandated by Congress in section 312(a)(7) of the Communications Act of 1934 as amended. More importantly, it denies the public the opportunity of hearing and seeing the candidates in the manner which they have chosen to appear. In support, the Committee shows as follows:

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FACTS

The Commission knows that these three television networks virtually control all of prime time on more than 600 stations covering nearly all television homes in the Nation. The prime time programming of all three networks is almost exclusively devoted to entertainment programming for commercial purposes. Each network on week nights (and Saturdays) schedules six half-hour prime time periods and eight on Sundays for a three network total of 132 per week or 528 per month. Sales to commercial advertisers by the networks for these commercial time periods is a multi-billion dollar business.

The Committee requested each of the networks to provide time availabilities for the purchase of a thirty-minute prime time period between 8:00 PM and 10:30 PM EST on either December 4, 5, 6 or 7, 1979. (Attached as Exhibit A are the letter requests.) The intention of the Committee was to select one of the networks after reviewing the availabilities. In each instance, the request was denied. (Attached as Exhibit B are the letters of denial.)

As Mr. Rafshoon indicated in his letters, the Committee is seeking to use the half-hour program for an appearance by the President shortly after he formally declares his candidacy for the Democratic Party nomination for President of the United States. The proposed program would stress the President's record and that of his administration. It is intended to set forth the basic case for renomination, and thus it was desirable to air the program shortly after the announcement. It is planned to have the television appearance coincide with more than 2,000 small-donor, grass roots fundraising gatherings in communities throughout the country. A substantial amount of careful advance planning and preparation is essential to this project, thus making an immediate decision in this matter imperative.

The request of the Committee was made nearly two months in advance of the air date in order to ease the scheduling burden on the networks and to give sufficient time for appropriate announcements in such publications as *TV Guide*. Also, the time requested was selected so as not to interfere with the national ratings sweep period which is so important to network sales.

The President Is Now Or Soon Will Be
A Legally Qualified Candidate Under the FCC's Rules

Since none of the three networks are contending or basing their refusal on a claim that President Carter is not a "legally qualified candidate" at this particular time—it is not an issue here. Nevertheless, the Commission should be aware that the Committee can establish that President Carter satisfies the requirements of the Commission's rules as set forth in section 73.1940, and once the formal public announcement has been made—which will be prior to the requested air time—there should be no question whatsoever in this regard.

The Reasons Given by the Networks
for Their Refusal to Sell Are Totally
Insufficient to Justify Their Actions

The reasons advanced by the networks so far are patently insufficient to justify their actions and demonstrate that they are being unreasonable.

1) *It is "too early" to begin a presidential campaign (NBC-ABC).* This is a matter which should be viewed in light of the needs of the candidate and not the belief of the network. Actions speak louder than words. All three networks have been devoting significant amounts of news coverage to the campaigns. The NBC evening news in recent weeks has been covering the campaign with a nightly segment showing a background logo entitled "Cam-

paign 80". Apparently, the sales department of this network does not agree with the news department. ABC goes so far as to indicate they will not sell political time until next year.

2) *If we sell to you, we would have to honor requests from other candidates (NBC-CBS).* Of course this is true, but there is a relatively limited number of national candidates in either party that are willing and able to purchase network prime time half-hours. At most, there will be three in the Democratic Party and probably no more than that in the Republican Party.* At preesnt, we are aware of a total of only three in both parties who made requests—a very limited number when compared to the 528 prime time half-hour periods being sold to commercial advertisers during the month of December.

3) *It would involve "massive disruptions" of the regular entertainment and informational schedules of CBS Television Network.* This is a preposterous overstatement in light of the practical circumstances outlined above. Certainly during the month in question there may be a few half-hour periods of entertainment programming and a few commercial announcements that will be rescheduled. This is not a novel or unusual happening for any of the networks. From time to time they each preempt their own programs for others, cancel shows, and insert new programs. As far as the reference to "informational" programming is concerned, the only public affairs or informational program in the regular CBS prime time schedule is "60 Minutes" and there would appear to be no need to disrupt it.

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* Furthermore, under section 315 of the Communications Act, only Democratic Party candidates can request "equal opportunities" if this request is granted.

4) *We will not sell you a half-hour but will sell a five-minute period at 10:55 PM on Saturday night December 8th and another in the day part.* CBS is willing to provide some time. Apparently the only disagreement is over the amount and the day of airing. It is past the four day time period requested, insufficient in amount and unsuitable to the needs of the candidate. The five minutes before 11 PM on Saturday is one of the least desirable periods in the network prime time schedule. It is generally regarded as the lowest rated portion of the weekly prime time schedule. More importantly, it is totally insufficient in amount to be of use to the candidate under the circumstances. It is obviously being tendered because it would enable the network to run its full schedule of commercials for the entire half-hour in 25 minutes and then sell the additional five minutes to the candidate for a "windfall" of additional revenue.

It is indeed ironic that all prime time periods on all three networks are being devoted exclusively to the carriage of commercial messages from national advertisers—none of whom are entitled to the right of "reasonable access" which Congress accorded Federal candidates in the 1971 amendments to the Communications Act.*

What the networks have not disclosed is that they have presold virtually all their prime time commercial positions to national advertisers between now and the end of the year. They just don't wish to disturb any of these sales—even though they have complete flexibility to do so under their contracts with the advertiser. We submit that this is not a sufficient reason to refuse sales of time to Presidential candidates.

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* The Campaign Communications Reform Act of 1971 added a new subsection (7) to section 312(a) of the Communications Act creating these rights and obligations.

Further evidence of the attitude of networks toward the important responsibilities entrusted to them by the Communications Act and the actions of this Commission is found in recent news interviews with network officials and other commentary which is attached hereto as Exhibit C.

The Networks Have Refused
To Provide Reasonable Access

Section 312 provides that:

> (a) The Commission may revoke any station license or construction permit—
>
> * * * *
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The Commission has long recognized that the three commercial television network corporations, as licensees of the most important broadcast stations in the nation are subject to their jurisdiction. Particularly, in connection with political broadcasting matters, the FCC has said that rate restrictions, and other provisions, are applicable to networks as well as to individual stations, "since networks are, in effect, selling time on behalf of their affiliated stations." *The Law of Political Broadcasting and Cablecasting*, 43 Fed. Reg. 36342, at 36377 (1978). Thus, there is no question that the FCC has jurisdiction to resolve this matter.

In its Report and Order in Docket Number 78-102* the FCC set forth general principles in determining whether a judgment about a request for political broad-

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* *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 43 RR2d 1029 (1978).

cast time is reasonable. The Commission made it clear that a candidate's request for a prime program is reasonable.

It should be noted that the Committee requested availabilities in order to *purchase*—not obtain free of charge—a single half hour on one of the three networks. It is not asking for the time now, but for a period in early December. It does not intend to make such purchases a regular practice. It has not made any additional requests for subsequent time, and, in part because of the expense of such time, it is unlikely that any such requests shall be made in the near future. The Committee determined that the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States. All three networks disagree and have refused to sell the time, leaving the committee with no alternative but to seek relief from this Commission. The Committee suggests that this is a blatant denial of reasonable access as required by Section 312(a)(7) of the Communications Act and the FCC's interpretations of this provision.

WHEREFORE, the Committee requests the Commission to determine that the three networks have denied the Committee reasonable access and to direct the networks to make time available for purchase. Because of the need for advance planning in order to effectively use the time and minimize the impact on the networks, the Com-

mittee requests the Commission to consider this complaint on an expedited basis.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

October 29, 1979

[Certificate of Service omitted in printing]

EXHIBIT A

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. Elton Rule
President
ABC
1330 Avenue of the Americas
New York, NY 10019

Dear Mr. Rule:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on ABC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for the Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

As you know, the first official contest to select delegates to the Democratic National Convention occurs Janu-

ary 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.

Unlike all previous Presidential election years, the news media has chosen to focus enormous attention on the Florida Caucus (October 13, 1979) and Convention (November 16-18, 1979) as well as other aspects of the 1980 campaign. As illustration, I have noted that in the six-week period from September 1 through October 9, 1979, ABC devoted 51 minutes, 22 seconds to the 1980 campaign; CBS devoted 51 minutes, 17 seconds to this subject; and NBC devoted 70 minutes. Therefore, our request for the above time seems eminently appropriate in view of the escalating political climate already generated by both print and broadcast media.

I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. Fred Silverman
President
NBC, Inc.
30 Rockefeller Plaza
New York, NY 10020

Dear Mr. Silverman:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on NBC between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for a Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

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I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

October 11, 1979

Mr. John D. Backe
President
CBS, Inc.
51 West 52nd Street
New York, NY 10019

Dear Mr. Backe:

On behalf of the Carter/Mondale Presidential Committee, Inc., I am requesting availabilities for a thirty (30) minute program on CBS between 8:00 p.m. and 10:30 p.m. E.S.T. on December 4, December 5, December 6, or December 7, 1979. This program, to be run in conjunction with an announcement concerning his candidacy by President Carter for a Democratic nomination for President, consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program.

As you know, the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after December 7, 1979, our last requested date for availabilities.

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I will expect to hear from one of your sales representatives within the next week regarding a selection of times in order that we may choose a mutually agreeable date.

Sincerely,

GERALD M. RAFSHOON
President

cc: Mr. Evan Dobelle
Mr. Timothy Kraft
Mr. Timothy Smith

EXHIBIT B

ABC TELEVISION NETWORK
1330 Avenue of the Americas
New York, New York 10019
Telephone 212 887-7142

Charles C. Allen
Vice President Sales Administration

October 23, 1979

Mr. Gerald M. Rafshoon
President
Rafshoon Communications
1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006

Dear Mr. Rafshoon:

This is to confirm my oral response given on October 16th to your letter of October 11, 1979 to Mr. Elton H. Rule, President of American Broadcasting Companies, Inc., requesting air time for the Carter/Mondale Presidential Committee, Inc. on December 4, 5, 6 or 7, 1979.

As we discussed, the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential campaign, and, accordingly, we are not in a position to comply with your request. As I mentioned on the telephone, I believe that later this year a decision will be made to make political time for the Presidential campaign available on ABC-TV early next year.

It was a pleasure speaking with you last week.

Sincerely yours,

/s/ Charles C. Allen
CHARLES C. ALLEN

CCA/lh

cc: Elton Rule

NBC TELEVISION
Network

A Division of
National Broadcasting Company Inc

Thirty Rockefeller Plaza
New York, N.Y. 10020 212-664-3286

Joseph J. Iaricci
Vice President,
Sales and Administration

October 23, 1979

Mr. Gerald M. Rafshoon
President, Rafshoon Communications
1775 Pennsylvania Avenue, N.W.
Suite 1250
Washington, D.C. 20006

Dear Mr. Rafshoon:

This is in response to your letter of October 11, 1979 to Mr. Fred Silverman, on behalf of the Carter/Mondale Presidential Committee, Inc., requesting 30-minute availabilities on NBC between 8:00 and 10:30 PM, EST, on December 4, 5, 6 or 7, 1979.

We have evaluated your request carefully. Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes. In addition, we believe that honoring your request at this early stage of the Presidential campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time is, of course, a significant factor in our decision.

Insofar as the nomination process is now focused on political activities in individual states like Iowa, you may wish to contact stations serving those particular states.

Please be assured that NBC News will continue to cover important and newsworthy aspects of President Carter's political activities.

Very truly yours,

/s/ JI

CBS
TELEVISION
NETWORK

A Division of CBS Inc.
51 West 52 Street
New York, New York 10019
(212) 975-4321

October 17, 1979

Dear Mr. Rafshoon:

This is in response to your request that the CBS Television Network make available for purchase by the Carter/Mondale Presidential Committee, Inc., a half-hour program in prime time to be broadcast between 8:00 and 10:30 PM EST on December 4, 5, 6 or 7, 1979.

Because of the large number of present and potential candidates for the Republican and Democratic presidential nominations, we are at this time unable to accede to your request to purchase a half-hour program. We note that three Democrats and eleven Republicans have already announced, or may reasonably be expected shortly to announce, their presidential candidacies; indeed two candidates for the Republican presidential nomination have already requested to purchase half-hour programs on the CBS Television Network, and their requests have been declined on the same basis as indicated below.

In light of the above circumstances, were we to provide the half-hour program you seek, accommodating potential requests for equal treatment from other candidates for presidential nomination would involve massive disruptions of the regular entertainment and information schedule of the CBS Television Network. Accordingly, we must respectfully reject your request.

We are, however, prepared to make one 5-minute segment in prime time and one 5-minute daytime segment available for purchase by your committee. We note that

this is the same offer made to the Republican candidates referred to above in response to their requests to purchase half-hour time periods.

While we are unable to make available time on the dates you have specified, we are able to offer for your purchase a 5-minute period on December 8 between approximately 10:55 and 11:00 PM. We will also provide a specific 5-minute daytime availability for your purchase on request.

Since it is CBS' policy to sell time only to announced candidates for public office, this offer is, of course, conditional upon President Carter's having announced, or using the time purchased to announce, his presidential candidacy.

If you are interested in purchasing such a program or programs, please notify us promptly since substantial lead time of approximately four to five weeks is necessary for the editing required to accommodate program segments of this length.

Very truly yours,

/s/ Raymond E. Dillon
RAYMOND E. DILLON
Director of Political Sales

Mr. Gerald M. Rafshoon, President
Rafshoon Communications
1775 Pennsylvania Avenue N.W.
Suite 1250
Washington, D.C. 20006

cg

EXHIBIT C

NETWORKS OPPOSING POLITICAL ADS NOW

Despite Appeals for Time, Stations Don't Believe That Campaign Season Has Arrived Yet

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By LES BROWN

Although the political season has begun considerably earlier than usual, high-ranking officials of the television networks have indicated that they would prefer to wait until after the first of the year to sell air time to candidates requesting it.

Two contenders for the Republican Presidential nomination, Ronald Reagan and John B. Connally, have already made formal requests to the networks for commercial time to promote their candidacies. And Gerald M. Rafshoon, who is handling advertising for President Carter's campaign, said on Friday that he would soon advise the networks of his wish to buy 30 minutes of air time on Dec. 4, 5 or 6 for Mr. Carter's announcement of his candidacy for a second term.

While ABC, CBS and NBC have not yet denied either of the Republican requests and are still only anticipating President Carter's as yet unsubmitted application, their inclination now is to turn them all down on the ground that they have not had time to prepare their schedules for an accumulation of political disruptions.

"There is no date for a political season that any one fixes," Howard Monderer, NBC's vice president for legal

affairs in Washington, said in a telephone interview. "But we know the political season when we see it. We don't think it is here yet. The decision is a management decision, but it is based to a large extent on our sense of whether the public is ready for political campaigning."

Probable Denial in Fall

He said that NBC would probably deny the Reagan and Connally requests, "at least in the time frame they're speaking of—October and November." He said the network had not yet heard from Mr. Carter.

Specialists in the rules for political broadcasting say that the networks are under no legal obligation to clear time for candidates' requests at this time, although Section 312 of the Communications Act requires that television and radio stations allow legally qualified candidates for national office to purchase "a reasonable amount of time" in behalf of their candidacies.

The catch is in the definition of a legally qualified candidate. Under Federal Communications Commission rules, a legally qualified national candidate is one who is on the ballot in 10 states. Since it is doubtful that any of the candidates currently requesting time have met that criterion—including President Carter, who will not be an announced candidate before his proposed broadcast—the networks are free to exercise their discretion in accepting political advertising now.

Political advertising on network television has usually begun in late March or April, a time when the networks are winding down their own competitive campaigns and have begun their cycle of reruns. In the spring and summer months, network programs can be preempted for political advertising without serious consequences.

Battle of Ratings Now

At the moment, however, the three networks are engaged in a fierce battle for popularity ratings and in the delicate autumnal process of inculcating regular viewing habits in the audience. In addition, they are faced with the obligation to their affiliated stations to mount their strongest programming in November for the periodic "sweep" ratings. These are the audience ratings for individual stations around the country on which they base their future advertising rates.

Under the equal time rule of the Federal Communications Act, the networks are obliged to provide equivalent time to all legally qualified candidates requesting it if they agree to sell time to any single candidate. Thus, the sale of a half-hour to President Carter could result in as many as a half-dozen pre-emptions to other Democratic candidates. This could wreck the chances for success for certain programs or the overall programming strategy of the network.

"Nothing is absolutely firm," Eugene Mater, a vice president of the CBS Broadcasting Group, stated. "We don't like to sell time this far ahead, but we're still exploring the question. The answer may depend on what the candidate is asking for. A one-minute spot or a five-minute broadcast might be accommodated; a 30-minute program presents bigger problems."

Ellis O. Moore, vice president of public relations for ABC Television, remarked: "The issues of political advertising are always complicated. At present, we don't plan to sell until after the first of the year, but I would hesitate to say that we have baked this policy in concrete. This is going to be an unusual year. It's hard to know what other factors may come into play."

RICHARD REEVES

WHO *ARE* THESE PEOPLE?

Certain constitutional provisions concerning free speech were suspended recently by Howard Monderer. He announced in New York that the United States is not ready for debate about its political future.

"There is no date for a political season that anyone fixes," Monderer said. "But we know the political season when we see it. We don't think it is here yet. The decision is a management decision, but it is based to a large extent on our own sense of whether the public is ready for political campaining."

Monderer's statement was backed by two of his associates, Eugene Mater and Ellis Moore. The triumvirate said they were considering allowing candidates for president to speak to the nation after Jan. 1, 1980.

Who the hell are these people? Monderer is vice president for legal affairs of the National Broadcasting Company. Mater is vice president of the Broadcast Group of the Columbia Broadcasting System. Moore is vice president for public affairs of the American Broadcasting Company.

It sounds like 1984. Candidates for president want to announce those candidacies to the nation where the nation will see them, on network television. The networks, so far, have decreed that such announcements would be inconvenient and unprofitable for them at this time.

The candidates be damned. The public be damned!

Later, when it suits their purposes, the triumvirate will restore the right of public debate. Then it will be very profitable indeed.

The new television season—with its rating battles to determine next year's commercial rates—will have been well launched by then and the public will be allowed to hear Jimmy Carter, Teddy Kennedy, Ronald Reagan, John Connally and the rest. Those candidates will be allowed the privilege of paying for network time—with contributor and taxpayer money.

Catch 22. The public owns the airwaves on which the networks and local television operate at truly obscene profits. Candidates for office may pay, at premium rates, for advertising time with money raised from the public or supplied by the U.S. Treasury through matching funds provided by campaign reform laws.

But network "management" has the power over when and how the money is used. The customer is not always right.

Mondierer and friends made their arrogance about all this public a week ago because Les Brown of The New York Times asked them why the networks have refused requests by Carter, Reagan and Connally to buy time for announcements this November and December.

Brown then gave the real explanation:

"The three networks are engaged in a fierce battle for popularity ratings and in the delicate autumnal process of inculcating regular viewing habits in the audience . . . In the spring and summer months (when the networks have begun showing reruns) network programs can be pre-empted for political advertising without serious consequences."

What about the serious consequences for democracy? Should network management have the power to decide when political debate can begin? Should the networks and television stations around the country be cashing in on the debate?

The explosion in the cost of campaigning in recent years, after all, is because of television advertising rates. That's where the millions of dollars in politics go—and where public corruption comes in—the money is needed to pay for television commercials.

If politics is really the public's business, then time for political messages should be provided free. Most of the money could be taken out of campaigning and, maybe, networks and station profits could be reduced to the point that they might be only about twice as big as the profits of oil companies.

[LETTER FROM
AMERICAN BROADCASTING COMPANIES, INC.]

LAW OFFICES

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 296-1600

James A. McKenna, Jr.
Vernon L. Wilkinson
Joseph M. Kittner
Robert W. Coll
Thomas N. Frohock
Carl R. Ramey
Edward P. Taptich
Norman P. Leventhal
Steven A. Lerman
R. Michael Senkowski
Virginia S. Carson
Lawrence J. Movshin
James S. Blaszak
W. Kennedy Keane
Kent Y. Nakamura

November 5, 1979

Arthur L. Ginsburg, Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Political Broadcasting Complaint
of the Carter-Mondale Presidential
Committee, Inc.

Dear Mr. Ginsburg:

American Broadcasting Companies, Inc., by its attorneys, hereby responds to the political broadcasting complaint of the Carter-Mondale Presidential Committee, Inc. (hereinafter "Committee") filed with the Commission on October 29, 1979. The Committee seeks a Commission ruling that it was unreasonable for the ABC

Television Network (and the television networks of CBS and NBC) to refuse to make time available for a 30-minute program, between 8:00 p.m. and 10:30 p.m., on either December 4, 5, 6 or 7, 1979, to be used by President Carter "in his capacity as a candidate for renomination by the Democratic Party for the office of President of the United States." *Complaint*, p. 1. The Committee asks the Commission to "direct the networks to make time available for purchase" on those dates. *Complaint*, p. 9.

The Committee's request is based on the "reasonable access" provision of the Communications Act (Section 312(a)(7)). In pertinent part, that provision states that the Commission "may revoke any station license" for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. 312(a)(7). The question the Committee's complaint poses, however, is not whether any particular federal candidate is entitled to access, or whether any particular form of access is reasonable; rather, the question relates exclusively to *when* access should be granted.*

ABC has not taken the position that it will not make time available. ABC has simply declined to sell program time on the specific December, 1979, dates requested by the Committee. ABC respectfully submits that its determination was reasonable and consistent with the public interest.

The Commission has recently addressed the precise question presented by this complaint. *In The Matter Of*

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* The Commission may feel that not even this question is properly before it inasmuch as the request for time comes on behalf of a person who is not yet a legally qualified candidate. See *Complaint*, pp. 3-4.

Commission Policy In Enforcing Section 312(a)(7) of the Communications Act, Report and Order released July 31, 1978, 68 FCC 2d 1079, 43 RR 2d 1029 (1978). There, in attempting to provide interpretive guidance as to the "particular point during a campaign [when] a licensee's obligation to afford reasonable access begins," the Commission held that, generally, "a licensee would be unreasonable if it refused to afford access to federal candidates at least during those [statutory] time periods" when the "lowest unit charge" provision of Section 315 is applicable—i.e., 45 days prior to a primary election and 60 days prior to a general election. As to whether "reasonable access" must be afforded *before* those periods, the Commission declared that this was a determination which "must be made in each case under all the facts and circumstances present." 68 FCC 2d at 1091, 43 RR 2d at 1045.

Commenting more directly on the situation presented here, the Commission observed that it had "received no Congressional guidance as to when Section 312(a)(7) should be effective prior to a convention or caucus since the 'lowest unit charge' provision applies only before election." 68 FCC 2d at 1092, 43 RR 2d at 1045. Accordingly, and recognizing the "large variation in procedures utilized for obtaining nomination through such methods," the Commission declined to suggest any time limits on access in such situations. It simply concluded that licensees would be expected "to afford access at a *reasonable time prior to a convention* or caucus." *Id.* (emphasis added).

The 1980 Democratic National Convention is scheduled for August 11-14, more than eight months after the broadcast dates requested by the Committee. The 1980 Republican National Convention is scheduled for July 14-16.

It is also significant that the first state primary where the general public will be given an opportunity to vote for Presidential candidates occurs in New Hampshire on February 26, 1980. Presidential primaries are scheduled the following month in Massachusetts, Vermont, South Carolina (Republican Party only), Alabama, Florida, Georgia, Puerto Rico (Democratic Party only), Illinois and Connecticut. From April 1 to June 3, 1980, 25 states and the District of Columbia hold Presidential primaries. At least six primaries will be held in 1980 that were not conducted in 1976. In all, thirty-six Presidential primaries have been scheduled for 1980—34 state primaries plus the District of Columbia and Puerto Rico. See *Congressional Quarterly*, October 20, 1979, p. 2336.

Moreover, it should be recognized that the ABC Television Network, unlike any individual television station, is a national medium. The suggestion that a single state caucus (*Complaint*, Ex. A) is sufficient to trigger access to a national medium, as distinguished from individual stations in and serving that state, is misguided.

Against this background, ABC made the judgment—as it is required to do under applicable law and Commission interpretation thereof—that it would not begin to sell political time on the ABC Television Network to candidates seeking nomination at the 1980 national political conventions until sometime in calendar 1980. In our view, the nature and length of the Presidential campaign and the multiplicity of candidates participating in that campaign fully warrant this decision.

The Committee seems to suggest that the period for "reasonable access" should begin when any federal candidate merely requests broadcast time. The Committee's view is contrary to Commission interpretation reached in its 1978 *Report and Order*, conflicts with the traditional principle of committing such matters to good faith li-

censee discretion, and would lead to unreasonable practical results.

As noted, the national nominating conventions are not scheduled until late next summer, and the first Presidential primary is still nearly four months away. Following the first primary in New Hampshire, primaries are conducted in 33 states and the District of Columbia over a three month period. This nominating process is not only long and involved, it is immediately followed by an extended national election period. Throughout these many months it can be anticipated that numerous requests will be made to purchase significant amounts of advertising and program time on both network affiliated stations (located in those states where Presidential primaries are being conducted) and on the national networks supplying programming to such stations.

The decision as to when to begin to sell time is also complicated by the number of candidates potentially entitled to such time. Although the Committee has sought to minimize this factor, it cannot be so easily minimized. Once time is sold to one candidate—either program or advertising time—"equal opportunities" must be afforded to all other bona fide candidates.* Depending upon when this process begins and the number of eligible candidates, the potential disruption to normal program schedules and the resulting impact on the national television audience may be considerable.

The Committee attempts to allay these concerns by suggesting that "there is a relatively limited number of national candidates in either party that are willing and

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* While the Committee is technically correct when it states that granting its request would only result in other Democratic party candidates being immediately entitled to "equal opportunities," ABC does not believe that, in the present circumstances, it can reasonably decide to grant access to the Democratic Party without deciding to afford access to the Republican Party.

able to purchase network prime time half-hours." *Complaint*, pp. 4-5. First, there is no basis for, and neither the Commission nor the networks can rely on, this kind of supposition. ABC certainly is not in a position to judge how many of the potentially eligible candidates would be interested in or have the ability to purchase a half-hour of network program time. Second, contrary to the Committee's conclusion concerning the limited number of candidates, ABC is presently aware of at least nine candidates who have already declared for the Republican Party nomination. In addition, one major Republican leader and two major Democratic leaders (in addition to President Carter) have indicated that they will formally announce their candidacies in the next few days or weeks. Moreover, once the process has commenced, there is no way of judging whether these or additional candidates will request multiple broadcast appearances. In short, it is apparent that the potential for significant disruptions in normal schedules well in advance of the first Presidential balloting is real, not theoretical, substantial, not slight.

Finally, the Committee contends that because ABC has devoted news coverage to the candidates and early campaign activities, it is foreclosed from determining that the sale of political time should not commence until sometime after the first week of December. News coverage and paid political time cannot be equated. In fact, the news coverage ABC has devoted, and will continue to devote, to candidates and the campaign, underscores rather than undermines the reasonableness of its determination not to commence the sale of political time this year. ABC's continuing news coverage ensures that the mixture of issues, developments (including candidate announcements) and personalities that dominate this early stage of the campaign are brought to the public's attention.

The "reasonable access" provision of Section 312(a)(7) embodies a concept significantly different from the on-going news and public affairs coverage of an election campaign. In enacting Section 312(a)(7) Congress did not intend to alter the role that news coverage performs in keeping the public informed without invoking "equal opportunities" requirements. Indeed, the news exemptions of Section 315 demonstrate the intent of Congress to foster news coverage of the political process apart from the conditions under which individual candidates are afforded the opportunity to purchase broadcast time.

ABC news coverage of the Presidential election process is on-going. While it is natural that this should escalate and expand as the election year approaches, such journalistic pursuits must not be interpreted as a trigger date for the beginning of time sales under the "reasonable access" provision. To do so might influence broadcasters to make news judgments based, in part at least, on the impact that initiation of campaign coverage would have on their overall program schedules.

In responding on October 23, 1979 to the Committee's request for time, ABC indicated that a decision would be made shortly as to when political time for the Presidential campaign would be made available on ABC-TV. That decision has since been reached. ABC will make time available beginning with the first week of January, 1980.

In our judgment, such a beginning date for the availability of national political time is reasonable and accommodates all relevant interests. As a matter of comparison, in the 1976 Presidential campaign the first pro-

gram time sold by ABC was for a 5-minute program on April 23, 1976.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By EVERETT H. ERLICK
1330 Avenue of the Americas
New York, New York 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Its Attorneys

cc: Timothy G. Smith, Esq.
John D. Lane, Esq.
Harold K. McCombs, Esq.
Counsel for the Carter-Mondale
Presidential Committee, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Complaint of the Carter/Mondale
Presidential Committee, Inc.

To: The Commission

RESPONSE OF
NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") hereby responds to the Complaint filed with the Commission by the Carter-Mondale Presidential Committee, Inc. ("Committee") on October 29, 1979, complaining of the refusal of the ABC, CBS and NBC Television Networks to sell it a one-half hour time period on their respective networks between 8 and 10:30 PM ET on December 4, 5, 6 and 7, 1979,* to be used for President Carter's campaign.

Introduction and Summary

NBC declined the request by the Committee to purchase time only after full consideration of the various factors.

It is now as early as one year before the presidential election, and almost five months before the earliest date during the 1976 nominating period when the NBC Television Network sold its first half hour to a candidate in that campaign (March 31, 1976).

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* No other length of network time and no other dates were requested by or appear to be satisfactory to the Committee. See Complaint, pp. 3 and 6. NBC therefore did not consider such alternatives.

The equal opportunities requirement of the Communications Act requires that all legally qualified candidates for a particular office be treated equally, regardless of their significance or lack of it and no matter how unlikely may be their chance of attracting voter support. Were the NBC Television Network to sell a half hour of prime time for use by President Carter at this time, on the basis upon which the Committee claims it, there would seem to be no basis on which the Network could refuse to sell a similar time period during prime time to every one of the many legally qualified candidates for the Democratic and Republican Party presidential nominations who might make a similar request.

At this stage of the campaign, there are so many candidates or potential candidates for these Parties' nominations—at least 12 who are now or have been governors, senators or representatives, plus at least 60 others who have filed with the Federal Election Commission a notice of their candidacy for the presidential nomination of the Democratic or Republican Parties alone—that such a result could be greatly disruptive of network program service. Should the Commission rule in favor of this request it would require broadcasters for the next 10 months to comply with similar claims of a large number of other actual and potential candidates, in many of whom the public has little interest but who may be legally entitled to equal consideration to President Carter.

The rigidity of the equal time laws simply does not allow either NBC or the Commission to distinguish between legally qualified candidates. NBC has, through the years, therefore supported repeal or suspension of the equal opportunities provisions of Section 315, particularly as to candidates for nomination or election to President of the United States. "Reasonable access" re-

quirements would be interpreted in the reality of the election process, based on the significance of the election contest and of the major candidates.

NBC therefore urges the Commision to deny the complaint. NBC also urges the Commission to seek congressional repeal or suspension of the equal opportunities provisions of the Communications Act, particularly as they apply to the nomination and election to the presidency.

I. NBC WAS NOT UNREASONABLE IN DECLINING THE COMMITTEE'S REQUEST.

The question before the Commision in considering the Committee's complaint is whether NBC was unreasonable in reaching its decision. Among the standards used by the Commission in determining whether judgments in this area are reasonable are:

(a) The length of the period between the requested broadcast and the date of the election contest with respect to which broadcast time is sought. As a general rule, the Commission considers that reasonable access must be provided by the licensees serving that state, during the 45 days before that state's primary election. Here, however, national network access is sought, rather than broadcast station service to a state in which a primary election is soon to be held; the relevant contest would seem to be the national convention of the political party, which in the case of the Democratic Party will be in August, 1980.

(b) The number of candidates. Here, there are currently at least 12 actual or potential candidates for the Democratic or Republican Party nomination who have held federal elective office or been governor of a state, plus at least 60 others who have filed with the Federal Election Commission a notice of their candidacy for the

Democratic or Republican Party presidential nomination, plus more than 50 others who have filed with the Federal Election Commission a notice of their candidacy for nomination by other parties or as independents.

(c) Whether the demands of the candidates could disrupt the normal broadcast program schedules. In the case of the NBC Television Network, there are only 2 half-hour series in its regular weekly schedule, with only 7 half-hour programs in those 2 series scheduled during the remainder of the entire month of December (not counting 2 children's specials scheduled in the days before Christmas). Obviously, preemption of these 2 entire series or of one-hour programs (in order to carry a half-hour political broadcast and some hastily-scheduled filler) would be disruptive. There is simply no way for NBC or the Commission to be assured that many of the other candidates will not be legally entitled to seek and receive the same "access" as demanded here.

A. *The appropriate standard for Commission review is whether NBC's judgment is unreasonable.*

Section 312(a)(7) of the Communications Act provides that "[t]he Commission may revoke any station license or construction permit

> "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *

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* Paragraph 7 was added by Public Law 92-225 (the Campaign Communications Reform Act of 1971) approved February 7, 1972, 86 Stat. 3.

The Commission traditionally has emphasized that it will "rely generally on the reasonable, good faith judgments of licensees as to what constitutes reasonable access under all the circumstances present in particular cases." *Enforcing Section 312(a)(7)*, 68 FCC 2d 1079, 1093, 43 RR 2d 1029, 1047 (1978); see also, *Summa Corporation*, 43 FCC 2d 602, 28 RR 2d 768 (1973); *Anthony R. Martin-Trigona (Radio Station WGN)*, 67 FCC 2d 743, 42 RR 2d 570 (1978). In *Enforcing Section 312(a)(7)*, *supra*, the Commission reviewed the legislative and administrative history of the implementation of Section 312(a)(7) and noted specifically that "[i]n tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; the specific desires of candidates, etc." *Id.* at 1091. The Commission has also indicated it expected "licensees to afford access at a *reasonable* time prior to a convention or caucus." *Id.*, at 1092, emphasis added.

The Commission has stated its awareness that "there may be situations where the number of federal candidates in a particular election make it impossible for a station to make prime time program time available." *Id.* at 1089.

As will be shown below, NBC has taken into consideration the factors specified by the Commission, and its judgment based on these factors cannot be ruled unreasonable.

B. *Factor of timing.*

NBC's October 23, 1979 letter to the Committee explained that "[b]ased upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes." *Complaint*, Exhibit B.

The fact is that it is now one year before the 1980 presidential election and about 10 months before the Democratic Party Convention. This compares to the 45- and 60-day periods the Commission established for stations as candidate-access periods generally applicable to primary and general elections, respectively. *Enforcing Section 312(a)(7), supra,* at 1091.

Neither the statute nor Commission precedent requires that the broadcaster invariably bow to the time demands of the first candidate who makes a "reasonable access" request. While the Commission left for case-by-case consideration what would be a reasonable period for access prior to a convention or caucus, surely it cannot be deemed legally unreasonable for a broadcaster to refuse a request so long before the event as this case involves.

Comparing the current situation to the 1976 campaign, the fact is that the earliest date on which any national television network broadcast a half-hour program of any candidate for a presidential nomination was March 31, 1976—a date four months later than that sought here.*

The Committee's letter to NBC mentioned that the first official contest to select delegates to the Democratic National Convention occurs January 21, 1980, in Iowa, which is 47 days after the last date for which it re-

* The NBC Television Network sold time on that date to Ronald Reagan, candidate for the Republican Party nomination. In this context, it should be noted that the NBC Television Network has not adopted a rigid policy of refusing to sell program time to candidates for presidential nomination. In fact, during the 1976 presidential campaign, NBC made prime time half-hour program periods available to several presidential nomination candidates prior to the national party conventions. NBC reaches its judgment on a case-by-case basis after weighing all relevant factors applicable in the particular case.

quested time (Ex. A to Complaint). This point is not made in the Complaint. As NBC pointed out in its response (Ex. B to Complaint), insofar as the nomination process is now focused on political activities in individual states like Iowa, the candidates may wish to contact stations serving those particular states, not seek national network time in states whose primaries or conventions may be scheduled on dates far into 1980.

The Democratic National Convention is 10 months away. To the extent that a candidate for that Party's nomination seeks *national* network time, it is with regard to that *national* event. If broadcast time were sought with regard to individual state primaries, conventions or caucuses, it would be more appropriate to reach the public in those states by ordering time from individual stations, not the national networks.*

In this context, it should be noted that even were the networks to carry the proferred program or the Commission to order them to do so in order to serve those few states holding early primaries, there is no assurance that individual stations would choose to broadcast it. In such cases, the networks are program distributors, not broadcasters. Stations are free to refuse the network offering (*e.g.*, see Section 73.658 (d) and (e) of the Commission's Rules). This is more than a legal nicety, since stations located in states where their local primaries are some months off may choose to decline the network offering in fear that if they accepted it, they would have to grant immediately similar access on a local basis to all the candidates in their area. This would move up the local campaigns to a point substan-

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* Indeed, it does not appear that Section 312(a)(7) applies to networks, since it applies explicitly to use of "a broadcast station" and is contained in a section of the Communications Act dealing with license revocation; networks are not a broadcast station nor are they licensed as such.

tially earlier than their individual judgments may believe warranted. This also points up the awkwardness and difficulty of a government agency overruling a network's reasonable judgment and seeking to determine "reasonable access" as a matter of law on a nationwide basis when what is really involved is a series of individual *state* primaries, caucuses, and conventions held at different times and places over a period of about 6 months.

During the preconvention period, the campaigns waged by the presidential candidates are on a state-by-state basis. They are geared to the primary elections as they occur in the various states. Thus, the need of the candidates to reach the primary voters in a state is best covered by the communications media serving that state.

C. *Factor of multiplicity of candidates.*

The Commission has recognized that the number of candidates vying for nomination or election is a factor the broadcaster may properly take into account in reaching his decision as to reasonable access. *Enforcing Section 312(a)(7), supra,* at 1090; *Hughes Tool Co.,* 42 FCC 2d 894 (1973); *Summa Corp., supra.* NBC's letter to the Committee identified this factor as a significant one in its own decision, noting that

> ". . . we believe that honoring your request at this early stage of the Presidential campaign would require NBC to honor similar requests from a number of other Presidential aspirants. The impact of such an undertaking at this time, is, of course, a significant factor in our decision" (Ex. B to Complaint).

While acknowledging the validity of this factor, the Complaint asserts that "there is a relatively limited num-

ber of national candidates in either party that are [sic] willing and able to purchase network prime time half-hours." It then claims that "at most" there will be 6, 3 in each major party. It acknowledges that two others have actually made requests already. (Complaint, pp. 4-5)

The Complaint is correct in its acknowledgment that this is a request for reasonable access, not for equal time. Under Section 315, only those contending for the nomination of a particular party are entitled to equal time to that used by a candidate for that party's nomination. But here, the request is for reasonable access under Section 312(a)(7), and the same basic principles apply to candidates for both the Democratic and Republican Party nominations.

However, the Complaint's facts and conclusions are erroneous and unjustified. Regardless of the subjective opinion of the Committee, there are at least 12 candidates for nomination (declared or expected by these two parties) who have held federal elective office or been governor of a state,* plus at least 60 other identified individuals who have taken the necessary steps toward qualification with the Federal Election Commission as candidates for nomination by the Republican or Democratic Parties to the office of the President in 1980.**

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* These are: John B. Anderson, Howard H. Baker, Jr., Edmund G. Brown, George Bush, Jimmy Carter, John B. Connally, Philip M. Crane, Robert J. Dole, Edward M. Kennedy, Larry Pressler, Ronald Reagan and Harold Stassen. The Committee does not identify the 6 it concedes would seek access.

** 33 others for nomination by the Democratic Party; 29 others for nomination by the Republican Party. The Commission can take official notice of such filings at the Federal Elections Commission which are published in a list, the latest which is dated October 29, 1979, *Candidate Cross Index* (FEC 93-1980). NBC incorporates that list by reference in this Response; in the alternative, NBC would be prepared to file with the Commission its copy of the Federal Election Commission's published list.

The Federal Election Commission lists more than 50 others who have filed notice of their candidacy for nomination by other parties or as independents. Section 73.1940(a)(4)(ii) of the Commission's Rules in effect limits reasonable access on a national basis to those candidates who have "made a substantial showing of bona fide candidacy . . . in at least ten states . . .," but neither the Commission nor NBC can, at this early stage of the campaign and one month before the requested broadcast time, determine (as the Committee assumes) that no more than 5 of these individuals would seek time equivalent to that sought by the Committee's request.* Were the Commission to base its decision on a determination that only a certain number of candidates will request time, what remedy would there be should that assumption prove erroneous?

In fact, a sale of a half-hour of time to President Carter would require NBC under the statutory equal opportunities requirements to be prepared to sell a comparable period to any of the President's legally qualified opponents for the nomination of the Democratic Party. 47 U.S.C. Section 315; *Hughes Tool Co., supra; Summa Corp., supra.* And if broadcaster judgments are to be overturned as unreasonable and prime time half-hour programs are held to be legally required for the Democrats, absent significantly different factual situations or some indication in the Commission's decision that such a decision was applicable only to Democratic candidates, logic would indicate that similar access periods also must be made available, upon request, to interested legally qualified candidates for the Republican Party presidential nomination.

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* If a candidate is legally qualified under the Commission's Rules and makes a timely request, he is entitled to his rights pursuant to Sections 315 regardless of whether the broadcaster believes he has any chance of success. *Columbia Broadcasting System*, 40 FCC 244 (1952).

The Commission has, in the past, recognized the validity of the disruptive nature of multiple political broadcasts. It has held that the broadcaster need not sell periods for political advertising which would unduly disrupt its schedule. *Letter to D. J. Leary*, 34 FCC 2d 471 (1972). It has acknowledged that "there may be situations where the number of federal candidates in a particular election may make it impossible for a station to make prime time program time available." *Enforcing Section 312(a)(7), supra*, at 1090.

If it is ever to be possible for a broadcaster to be able to take into consideration the multiplicity of candidates in reaching its determination as to reasonable access, this case requires the Commission to acknowledge the reasonableness of NBC's judgment here.

C. *Factor of disruption of the schedule.*

The enormity of the potential disruption of the NBC Television Network prime time schedule is obvious. NBC would have to hold itself available to sell a prime time half-hour to every other legally qualified candidate for the Democratic Party nomination and probably the Republican Party as well. This would be an enormous disruption of the prime time schedule, even assuming all of it was readily available for such sale.

But despite the contrary claims made at page 2 of the Complaint, NBC has scheduled only 9 prime time half-hour programs for the remainder of the month of December, 1979, starting with December 4, the first date requested by the Committee. Of these 9 programs, two are Christmas specials for children. The other 7 are programs in the only 2 regular half-hour prime time series on the NBC Television Network. Not only would these 2 series be likely to be disrputed, but presumably, unless the other candidates would be required to share

an hour,* which they usually do not like to do, NBC would have to perform "major surgery" on the remainder of its prime time schedule to accommodate other requests.

There is simply no way for NBC or the Commission to be assured that many of the other candidates are not or will not be entitled to seek and receive the same "access" as demanded here. They are not parties to this proceeding and the Commission cannot now rule on their present legal qualifications, let alone on what their status will be in a month from now. Nor can either NBC or the Commission assume that they do not now have nor will they be able to raise from others or their own assets the necessary funds to purchase the network time period. Similarly, neither NBC nor the Commission can decide to sell a particular maximum number of half-hours to the candidates (regardless of whether all candidates who seek time have received it) and call it quits. Sections 315 and 312(a)(7) simply do not work that way.

It is clear that the "reasonable access" provision does not require broadcasters to "disrupt their programming schedules." *Enforcing Section 312(a)(7), supra,* at 1090, 1096.

In this connection, it might be noted that the NBC Television Network does not generally sell individual program periods (whether 30 minutes in length or otherwise) to commercial advertisers. The usual commercial sale is of 30-second or one-minute commercial units; and no commercial advertiser may use an entire 30-minute period for its message. The NBC Television network does attempt to clear longer program periods for political candidates where that is practical and reasonable in the light of all the circumstances, and did so before the adoption of Section 312(a)(7). But to do so in the

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* Even the two regular half-hour series are back-to-back in a one-hour period.

circumstances here would not only require varying from its normal commercial format but massive disruptions in its program service.

The Commission itself has recognized that reasonable access "only requires that the licensee follow its usual commercial practices" with respect to the classes and lengths of program or spot time offered to commercial and political advertisers. *Id.*, at 1090; see also *WGN*, 58 FCC 2d 1142, 1144 (1976). More generally, the Commission has stated that Section 312(a)(7) was not designed to preempt all or most broadcast time for political purposes; that "[i]mportant as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political." * *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972). NBC respectfully submits that these policies have particularly cogent application to the facts and circumstances involved here.

II. THE CONGRESS SHOULD REPEAL OR SUSPEND THE EQUAL OPPORTUNITIES PROVISIONS OF SECTION 315.

The present situation is caused by the equal opportunities requirement of the Communications Act, which requires that all legally qualified candidates for a particular office be treated equally, regardless of their sig-

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* In this context, it is important to recognize that the NBC Television Network has provided the public with access to President Carter. Since January 1, 1979, President Carter has made 36 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in over 100 reports in each of the NBC NIGHTLY NEWS and NBC TODAY programs since the beginning of this year.

nificance or lack of it and no matter how unlikely may be their chance of attracting voter support.

Were broadcasters able to limit their sales of time to those candidates for presidential nomination regarded as significant, they could establish some reasonable limits to the forced disruption of program schedules in order to present candidates in which the public had little or no interest. This could be done by repeal or supervision of the equal opportunities requirements, and interpretation of "reasonable access" in terms of the reality of the election process, based on the significance of the election contest and of the major candidates. NBC has, though the years, supported repeal or suspension of the equal opportunities provisions of Section 315, particularly as to candidates for nomination or election to President of the United States.

NBC therefore respectfully urges the Commission, concurrently with its denial of the Complaint because NBC has not been unreasonable, again to seek from the Congress repeal or suspension of the equal opportunities provisions of the Communications Act, particularly as they apply to the nomination and election to the Presidency.

CONCLUSION

On the facts of this case, the Commission must uphold the judgment of the NBC Television Network in declining to sell a half-hour of time between 8 and 10:30 PM ET to the Committee on December 4, 5, 6 or 7, 1979, as not unreasonable.

Respectfully submitted,

/s/ Corydon B. Dunham
CORYDON B. DUNHAM
Executive Vice President
and General Counsel
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10020

/s/ Howard Monderer
HOWARD MONDERER
Vice President, Law, Washington
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

November 5, 1979

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential Committee, Inc.

RESPONSE OF CBS INC.

I. PRELIMINARY STATEMENT

This is in response to the FCC staff's oral request, on October 30, for CBS' response to an October 29 complaint by the Carter-Mondale Presidential Committee, Inc.* against CBS, NBC and ABC. The complaint arises in connection with the Committee's request to each of the networks to purchase a half hour of prime time between December 4 and 7 of this year to promote President Carter's campaign for the Democratic presidential nomination.

With respect to CBS, complainant contends that the offer of the CBS Television Network to sell the Carter-Mondale Committee two 5-minute program length segments, including one 5-minute period in prime time, is inadequate to satisfy the "reasonable access" provision set forth in Section 312(a)(7) of the Communications Act.** Thus,

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* (hereinafter "Carter-Mondale Committee," "Committee" or complainant)

** Section 312(a) provides that "The Commission may revoke any station license . . . (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." While the provision is addressed to stations and not the networks, we believe that the CBS Television Network has, in any event, been reasonable in its offer of time to the Committee.

complainant argues that, even at this very early date in the presidential campaign, it has an absolute right to purchase a 30-minute program in prime time.

We believe that complainant's position is without legal merit. The Commission has afforded broadcasters considerable discretion in determining how they will meet their reasonable access obligations under Section 312(a)(7).* That discretion has extended to the amount of time and length of program segments to be made available to federal candidates,** as well as to determining when selling time in connection with a particular campaign will begin.***

As we will demonstrate below, the instant facts present a particularly strong case for allowing significant flexibility to broadcasters in determining how much time they will currently sell to presidential candidates. The long campaigns for presidential nomination, which will extend over the next nine months and involve 36 primary elections, have just begun—indeed, none of the three major contenders for the Democratic presidential nomination has as yet even formally announced his candidacy. Additionally, the number of contenders for the major party presidential nominations in 1980 is unusually large: at least three Democrats and 11 Republicans,****

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* See pages 13-21, *infra*.

** See pages 15-17, *infra*.

*** See pages 19-20, *infra*.

**** In addition to President Carter, Senator Kennedy and Governor Brown are now considered very likely to run for the Democratic presidential nomination. Among Republicans, Senators Baker, Dole and Pressler; Representatives Anderson and Crane; Governor Connally; former CIA Director George Bush and Harold Stassen have already announced their presidential candidacies, as has Benjamin Fernandez, a leading California businessman whose candidacy has been widely reported in the national press and who expects to wage a $15 million campaign for the Presidency. Addi-

are presently seeking, or may reasonably be expected to seek, their party's presidential nomination. Most important to consider at this time is the fundamental political reality of the presidential nominating process—that the race for convention delegates focuses largely on a series of contests in individual states.

In these circumstances, to require that a national network presently sell half-hour time periods to candidates for presidential nomination would risk significant disruption of regular network programming over the next nine months—disruptions that would affect a nationwide audience, notwithstanding the fact that only scattered local contests are presently occurring. Given these facts, and the Commission's recognition that "the public is entitled to other kinds of programming than political," * we respectfully submit that CBS' present offer of two 5-minute time periods to the Carter-Mondale Committee is fully consistent with the reasonable access provision.

II. RELEVANT BACKGROUND

In considering this complaint—and the possible consequences of a ruling favorable to the Carter-Mondale Committee—the Commission should bear in mind that rarely, if ever, has the CBS Television Network received

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tionally, Governor Reagan has stated his intent to announce his candidacy within the next several weeks, and its is reported that General Alexander Haig may shortly become a candidate for the Republican presidential nomination. Finally, many "fringe" candidates for the Presidency may be expected to emerge during the course of the campaign. In this connection, we note that, while it is uncertain how many would meet this Commission's criteria for "legal qualification," there are currently 115 individuals registered as presidential candidates with the Federal Election Commission. *See, Us Magazine*, November 13, 1979, p. 24.

* *Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 43 RR 2d 1029, 1042 (1978) (hereinafter "Report and Order").

so many requests to purchase program length time periods this far in advance of a presidential election. A brief summary of the requests so far received and their disposition by CBS follows.

By telegram of September 14, the Connally for President Committee requested to purchase on the CBS Television Network (1) five 5-minute time periods in prime time between October 1 and December 1, 1979; (2) a half-hour segment in prime time between October 15 and November 15; (3) comparable time with 72 hours of any "major program" on behalf of Governor Reagan; and (4) a 15-minute program between 10 AM and 2 PM on Thanksgiving Day. Although CBS declined to meet this request in light of the number of candidates for presidential nomination, it offered to sell the Connally Committee two 5-minute time periods, one in prime time and another in daytime. In accordance with this offer, the Connally Committee subsequently purchased two 5-minute programs on the CBS Television Network to air on October 30 and November 21. At the same time, the Connally Committee in an October 10 letter to CBS reasserted its position that it was entitled to purchase all of the program time it had originally requested, and further demanded equal time within 72 hours "should any of the serious unannounced candidates for the Republican or Democratic nomination be granted program time."

On September 21, the Reagan for President Committee requested to purchase a half-hour program in prime time on the CBS Television Network between November 4 and 18 (excluding four dates within that period). Once again, CBS responded by offering * one 5-minute prime

* Since Governor Reagan had not yet formally announced his candidacy, CBS' response to his request indicated that it was CBS policy to sell time only to announced candidates for public office, and its offer was accordingly made conditional on Governor

time and one 5-minute daytime segment, and once again two such programs were purchased, to air on November 13 and 14 respectively.

By letter of October 11, the Carter-Mondale Committee asked to purchase a 30-minute segment on the CBS Television Network between 8 PM and 10:30 PM EST on December 4, 5, 6 or 7. In its October 17 response, CBS offered to sell the Committee a 5-minute time period on December 8, 1979 * at approximately 10:55-11:00 PM, plus a 5-minute daytime segment at a date and time to be mutually agreed. In its letter, CBS explained that it was unable presently to grant the Committee's request for a half-hour time period in light of the multiplicity of candidates which now exists, and noted that it had responded to similar requests from two candidates for the Republican presidential nomination in an identical manner. The filing of the instant complaint followed.

Reagan's having formally announced, or using the time purchased formally to announce, his presidential candidacy. The CBS Television Network's offer of time to the Carter-Mondale Committee was similarly conditioned.

* In its complaint, the Carter-Mondale Committee criticizes CBS' offer of this time period on the ground that "[t]he five minutes before 11 PM on Saturday is one of the least desirable time periods in the network prime time schedule." Leaving aside the question of whether complainant would be entitled to demand to purchase a program length segment in prime time on a particular day of the week, *see, e.g., Report and Order*, 43 RR 2d at 1044, we note that CBS offered the December 8 availability because it was the closest date to those requested by the Carter-Mondale Committee on which a prime time program suitable for the editing necessary to accommodate a 5-minute political broadcast was planned. Although the Carter-Mondale Committee did not respond to our letter of October 17, CBS was and is prepared to negotiate with the Committee concerning the date of a 5-minute prime time broadcast.

III. DISCUSSION

1. *CBS' Decision is Reasonable*

As is apparent from the preceding discussion, the CBS Television Network has been willing, even at this early date in the 1980 campaign, to sell reasonable amounts of program time *—including prime time segments—to candidates seeking the presidential nominations of their parties. This is in accord with CBS' longstanding policy of making reasonable amounts of program and "spot" announcement ** time available for sale to political candidates to present their views and for fund raising purposes. In addition, the CBS Television Network has traditionally sold half-hour time periods to presidential candidates during general election periods and will do so again next fall.

As we have noted, however, campaigns for presidential nomination consist largely of a series of state primary elections, conventions and caucuses conducted over many months.*** Although each of these contests will obviously be newsworthy and the subject of national interest, the actual campaigns for delegates will necessarily be conducted on a local level and focus on the voters of individual states. Thus, while the CBS Tele-

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* Both industry practice and FCC precedent support the view that 5-minute segments constitute program time rather than "spot" announcements. See p. 16, *infra*.

** Although the CBS Television Network has not yet received requests to purchase "spot" announcement time from presidential candidates in connection with the 1980 campaign, it of course stands ready to make such announcements available, as it has in previous elections.

*** Thirty-four states, plus the District of Columbia and Puerto Rico, will hold presidential primaries in 1980. These primaries will begin in February and will not be completed until June 3. The national conventions will begin on July 14 (Republican) and August 11 (Democratic).

vision Network has not previously sold half-hour time periods to presidential candidates in the pre-convention period, the CBS Owned television stations have in past years made reasonable amounts of announcements and program time—including half-hour segments—available to presidential primary candidates.

At this point in the 1980 campaign, however, the CBS Television Network has made the judgment that the public interest does not require the preemption of extensive segments of its national program service for political broadcasts of half-hour duration. We emphasize again the unusually large number of candidates who are seeking the major party presidential nominations in 1980, and the concomitant likelihood that many hours of programming normally expected by the nation's viewers will in fact be disrupted if the Commission rules in favor of the Carter-Mondale Committee. In its complaint, the Committee expends considerable effort in an attempt to downplay the significance of the multiplicity of presidential candidates which presently exists. Thus, in a wholly unsupported and conclusory statement, complainant argues that "there is a relatively limited number of national candidates in either party that are willing and able to purchase network prime time half-hours." Further, the Carter-Mondale Committee assures the Commission that complainant "does not intend to make such purchases a regular practice," and that "it is unlikely that any such requests shall be made in the near future." *

* Complainant also contends that under Section 315 of the Communications Act only Democratic Party candidates could claim "equal opportunities" were the instant request to be granted. While complainant is technically correct, CBS could not under its own standards of fairness refuse to sell half-hour programs to Republican presidential candidates while making such time periods available to Democrats. Indeed, it is doubtful whether such a decision would be sustainable before this Commission.

Complainant's assertion that there will be only a "relatively limited" demand for network half-hours by presidential candidates is, of course, purely speculative. Indeed, the experience of the CBS Television Network in the 1976 presidential primary campaign would appear to cast substantial doubt on this contention. Thus, before the 1976 Democratic and Republican conventions, the CBS Television Network sold 14 five-minute time periods * to candidates for major party presidential nomination. It is reasonable to assume that, had half-hour time periods been made available by the network in connection with the primary campaigns, many of these purchases would have been of half-hour programs.

Moreover, complainant's assumption that only the most serious contenders for the Presidency will make such purchases is likewise unsupported by experience. Thus, in the 1976 primary campaign, such candidates as Ellen McCormick and Eugene McCarthy purchased program time on the CBS Television Network, with Mrs. McCormick purchasing four 5-minute segments. In the general election period, program time on the CBS Television Network was sold not only to the Democratic and Republican nominees, but also to the candidates of the Libertarian, Communist, American and Pro-Life parties, and to Eugene McCarthy running as an independent.

While the Carter-Mondale Committee presently asserts that it does not intend to make such purchases a "regular practice," and that it is "unlikely" to request further half-hours in the "near future," it obviously has no power to bind other candidates in this regard. Indeed, the fact that the campaigns for presidential nomination involve a series of important primary elections, with different candidates considering different primaries crucial to their individual campaign strategies, would

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* Twelve of these programs were broadcast during prime time.

appear to make repeated requests * for half-hour programs very likely. As noted above, the CBS Television Network has already received three requests to purchase half hours in connection with the 1980 campaign, months before such requests have normally been received in the past. It is simply illogical to assume, as complainant apparently does, that these early requests are an indication that demand for half-hours will be limited. On the contrary, we believe that the highly unusual amount of political buying of network time which has already taken place adds weight to our concern that an adverse Commission ruling on the instant complaint will lead to a substantial number of requests for prime time half-hours as the campaign gathers speed with the commencement of the vital state primaries.**

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* Each purchase of a half-hour time period would, of course, give rise to potential "equal opportunities" obligations under Section 315 of the Communications Act.

** In evaluating the total impact which a favorable ruling on the Carter-Mondale complaint is likely to have, the Commission should be aware that presidential and other federal candidates may also be expected to seek to purchase prime program time on local television stations during the 1980 primary campaigns. Moreover, in addition to federal races, gubernatorial and other state and local primary candidates are likely to request program time on local stations, and licensees may determine that such requests should in the public interest be granted. We note, for example, that primary elections for the following offices will be held within the coverage area of WCAU-TV, the CBS Owned television station in Philadelphia: (1) *Pennsylvania*: United States President; United States Senator (one seat); United States Representative (11 seats); State Attorney General; State Auditor General; State Treasurer; State Senator (12 seats in viewing area); State Representative (100 seats in viewing area); (2) *Delaware*: United States President; United States Representative (one seat); State Governor and Lt. Governor; Secretary of State; State Treasurer; State Auditor; State Insurance Commissioner;

Finally, even if the Commission were to decide, notwithstanding the circumstances outlined above, that candidates are entitled to network half-hour time periods at some point during the presidential primary campaign, we submit that there would be no basis for overturning CBS' judgment that such sales are presently premature. While complainant argues that "[t]his is a matter which should be viewed in light of the needs of the candidate and not the belief of the network," prior Commission decisions * make clear that the desires of candidates are not always paramount in this area and that broadcasters do have substantial discretion to decide when they will begin selling time to political candidates. We do not believe that the CBS Television Network's offer of 5-minute, rather than half-hour, time periods to presidential candidates nearly a year before the general election and months before the earliest state primaries can be characterized as unreasonable.

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(3) *New Jersey*: United States President; United States Representative (five seats).

Thus, the Carter-Mondale request to purchase a half-hour of network prime program time cannot be isolated from the extensive demands for political time that stations will receive from candidates for other federal, state and local offices. In this connection, we note that to the extent that the practical effect of Section 312(a)(7), by creating a favored class of federal candidates, is to limit the ability of local television stations to sell time in connection with important state and local races while still preserving the public interest in non-political programming, serious questions may be raised concerning the constitutionality of the statute. Indeed, in its recent *Report and Order* concerning enforcement of Section 312(a)(7), the Commission explicitly noted that it "[t]akes no position on the constitutionality of Section 312(a)(7) or the federal preemption of the area of political broadcasting." 43 RR 2d 1029, 1047 (1978).

* See pp. 19-20, *infra*.

2. *CBS' Decision Is Supported By Commission Precedent*

The sole issue raised by the Carter-Mondale Committee's complaint insofar as CBS is concerned is whether CBS' decision to make 5-minute rather than 30-minute time periods available for purchase by candidates at this stage of the 1980 presidential campaign is reasonable under Section 312(a)(7), as interpreted by the Commission.

There is little in the legislative history surrounding the enactment of this provision to shed light on whether the broadcast of 5-minute rather than 30-minute programs is "reasonable." * In such circumstances, we submit that it is particularly appropriate that great reliance be placed on the Commission's prior interpretations of a statute which it has been charged with administering.

While Section 312(a)(7) is a relatively recent addition to the Communications Act, we submit that Commission decisions interpreting the provision require an affirmance of the reasonableness of CBS' decision. Surely licensees have to date relied on these interpretations and have acted on them in considering requests by candidates for time. The Commission has repeatedly held that the standard of review is whether the licensee has acted *reasonably*. Thus, the Commission has stated:

> "[N]o embracing standard can be set. The test of whether a licensee has met the requirement of . . . [312(a)(7)] is one of reasonableness." **

Similarly, in its recent *Report and Order* concerning enforcement of the "reasonable access" provision, the Commission concluded:

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* See e.g., *Concerning Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 FCC 2d 516 (1974).

** *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972) (hereinafter *Notice*).

> "We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable good faith discretion of individual licensees." *

Thus, the Commission has stated that

> "[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." **

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* *Report and Order*, 43 RR 2d 1029, 1043 (1978).

** *Summa Corp.*, 28 RR 2d 768, 771 (1973). We believe that the broad discretion which the Commission has afforded to broadcasters in the implementation of Section 312(a)(7) is particularly appropriate, since serious First Amendment questions may be raised concerning its constitutionality. Thus, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court held that the First Amendment and the public interest standard of the Communications Act could not be read to require public access to the broadcast media for the presentation of "editorial advertising." While the Court did not reach the issue of whether the Commission or the Congress could constitutionally require such access, the Court was clearly sensitive to the First Amendment concerns which any system of mandated access would involve. Thus, the Court emphasized that the "selection and choice of material" is the essence of the editorial process (412 U.S. at 124), and went on to state:

> "The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determinination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles

In *Letter to Paul A. Talmey,** the Commission staff affirmed a licensee's rejection of a request by a candidate for 30-minute programs during periods of "prime audience potential." The licensee had offered only 5-minute programs during such high audience time periods.** The complainant there argued, in much the same manner as the instant complaint, that "the issues which a federal candidate needs to discuss cannot reasonably be dealt with in only five minutes." The staff stated that

> "the Commission has refrained from establishing a precise definition of the 'program time' to which Federal candidates are entitled under Section 312 (a) (7). Consequently, we find that [the complainant's] claim that the licensee's offer of five-minute prime time availabilities was unreasonable since '. . . five-minutes of air time is not a program . . .' is without merit." ***

Thus, the Commission staff has acknowledged that a 5-minute program is, indeed, a program.

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against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for a speculative gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result." (412 U.S. at 127) (footnotes omitted).

While the instant case involves a statute enacted by the Congress, the inherent constitutional problems with a government agency dictating to broadcasters what to present and when are no less serious here than in *Democratic National Committee*. Accordingly, whatever the constitutional status of Section 312(a) (7), we respectfully submit that the Commission must interpret the statute in light of the paramount importance, recognized by the Court in *DNC*, of the editorial discretion of broadcasters.

* 31 RR 2d 1039 (1974).

** The licensee had also offered a half-hour program at 6 PM.

*** 31 RR 2d at 1311.

In another recent case, *In Re Complaint of Hon. Pete Flaherty*,* a candidate for the United States Senate sought a 4½ hour segment on a number of Pennsylvania stations for a fund-raising telethon. The Commission, in rejecting the complaint, emphasized that it would not dictate to licensees the precise manner of their compliance with Section 312(a)(7):

> "The statutory language speaks in terms of '*reasonable* access' and '*reasonable* amounts of time' rather than in any absolute terms. Similarly while our June 1974 Public Notice recognized a right of access by Federal candidates to prime time program-length time, . . . we have refrained from prescribing any precise formula for measuring licensee performance in honoring that right so as to not to interfere unnecessarily with licensee scheduling and program discretion." **

Furthermore, while the Commission has interpreted Section 312(a)(7) as requiring that program length segments be made available for purchase by federal candidates in prime audience periods, it has recognized that there are circumstances—such as the existence of a multiplicity of candidates—which may render this general requirement inapplicable. Thus, in its recent *Report and Order* the Commission stated:

> "[W]e are aware that there may be situations where the number of federal candidates may make it impossible for a station to make prime time program-time available. We have never held that the 'prime time, program-time' policy is absolute and inflexible. We will continue to make exceptions to this policy where circumstances dictate." ***

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* 31 RR 2d 255 (1974) (hereinafter "*Pete Flaherty*").

** *Id.* at 272.

*** 43 RR 2d at 1043.

Here, of course, the CBS Television Network has not declined to provide prime time program time but only half-hour time periods.

In attempting to belittle the significance of potential disruptions of regular network programming resulting from the sale of half-hour programs to candidates for presidential nomination, the Carter-Mondale Committee contends that "[t]he prime time programming of all three networks is almost exclusively devoted to entertainment programming." * The Commission has repeatedly recognized, however, that there is a public interest in the presentation of a licensee's normal programming, and that a licensee is not obligated to preempt such programming solely because a candidate believes that a particular program length serves his interest.** Thus the Commission has stated:

> "Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political." ***

Indeed, in *Pete Flaherty* the Commission rejected the complainant's suggestion that the "licensees be called upon to explain '. . . why the public interest is better served by presentations of old movies or network reruns than an attempt from an aspirant to the . . . [U.S.

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* In this connection, we note parenthetically the obvious fact that CBS News provides very significant coverage of presidential candidates and their views in its regular news and public affairs broadcasts, and in news interview broadcasts such as FACE THE NATION.

** *See, e.g., Hon. Donald W. Riegle*, 38 RR 2d 1343 (1976); *Paul A. Tamley*, 31 RR 2d 1309 (1974); *James H. Doyle*, 38 RR 2d 330 (Bdcst. Bureau 1976).

*** *Report and Order*, 43 RR 2d at 1042, quoting *Notice*, 34 RR 2d at 536.

Senate] . . . to reach the public.' " The Commission stated that

> "[O]ur scope of review over licensee action in this area is narrow, and, were we to call upon licensees to justify their programming selections or program scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when—a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." *

The reasonableness of CBS' decision not to sell half-hour programs to presidential candidates at this point in the campaign is further indicated by Commission decisions sustaining the exercise of licensee discretion as to when to begin selling time to candidates in federal elections. Thus, in *Matter of Anthony R. Martin-Trigona,*** a candidate in a primary for United States Senator complained under Section 312(a)(7) of a broadcaster's refusal to sell him announcement time until forty-five days before the election. In rejecting this complaint, the staff stated:

> "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, *but to the date on which its campaign coverage will commence.* A licensee's decision not to accept political advertising until 45 days before a primary election cannot be said to be an unreasonable refusal to devote adequate coverage to a significant and important election, and does not constitute a denial of

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* 31 RR 2d at 273.

** 66 FCC 2d 968 (Bdcst. Bureau 1977), aff., 41 RR 2d 1607 (1977).

> reasonable access to a candidate for Federal office. The fact that stations in other cities in the state have sold time for political announcements seven months in advance of the election does not render unreasonable a contrary determination by any other licensee."

Similarly, in a separate case involving the same candidate, the Commission sustained a licensee's determination not to sell time in connection with a March senatorial primary until January 1.*

Although there are obvious differences between a campaign for the U.S. Senate and the Presidency, we stress once again that CBS has not refused to sell prime time announcements and program length segments to the complainant. Rather, it has declined presently to sell half-hour time periods. A Commission ruling requiring that half-hour programs be made available at this point in the campaign would, in our view, be simply irreconcilable with the Commission decisions cited above.**

Finally, it should be emphasized that the Commission's role here is not to "substitute its judgment for that of the licensee, but, rather, . . . [to] determine in any case

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* *In re Anthony R. Martin-Trigona*, 42 RR 2d 570 (1978).

** While complainant has ctied no Commission decision in support of its contention that it is presently entitled to purchase half-hour program segments, a 1976 oral ruling by the Commission on a complaint by Senator Frank Church may be thought relevant to the present facts. In that case, the Commission found that an Oregon television station had failed to comply with the "reasonable access" provision by declining Senator Church's request to purchase a half-hour prime time program on the eve of the Oregon Democratic presidential primary. Whatever the merits of the Commission's ruling on the Church complaint, it is clearly distinguishable from the instant situation, since the earlier case involved the efforts of a Presidential candidate to purchase time on a local station, in connection with a local primary, immediately before the election in question.

that may arise whether the licensee can be said to have acted reasonably and in good faith." * Thus, the standard of review is not whether the Commission necessarily agrees with CBS' decision, but whether the Commission concludes that CBS' decision was unreasonable as a matter of law.

CONCLUSION

CBS is cognizant of its responsibility as a broadcaster to serve the public interest by providing information about those seeking the nomination for this country's highest public office. We also are aware of the important role fund-raising plays in the political process. In light of these considerations, the CBS Television Network has made available programs of 5-minutes duration—in prime and non-prime hours—for purchase by candidates during this pre-primary phase of the 1980 presidential campaign.

In ruling on this complaint, the Commission need go no further than deciding whether, as a matter of law, CBS' actions in this matter amount to an abuse of its legitimate discretion. We think the Commission's prior cases make clear that no such abuse of discretion is here in issue.

Accordingly, for all the reasons set forth herein, we respectfully urge the Commission to reject complainant's request that the Commission direct the CBS Television

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* *Notice*, 34 FCC 2d at 536.

Network to make 30-minute programs available to the Carter-Mondale Committee.

Respectfully submitted,

CBS INC.

By /s/ Ralph E. Goldberg
RALPH E. GOLDBERG

By /s/ Howard F. Jaeckel
HOWARD F. JAECKEL

Its Attorneys

51 West 52 Street
New York, New York 10019

November 6, 1979

cc Timothy G. Smith, Esq.
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

ABC Television Network

CBS Television Network

NBC Television Network

To: *The Commission*

REPLY OF CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

The networks' responses show that the Committee's complaint presents the Commission with important questions of statutory interpretation, which it has not yet had the opportunity to address in a specific context, as to the meaning and intent of the candidate access provisions of Section 312(a)(7). The reasons set forth by the networks for their refusals to sell a one half-hour time period provide, in fact, no justification whatsoever under the statute for their actions. What the networks are really telling the Commission is that, for reasons of their own business convenience, they are not prepared to alter their normal commercial operations and are not required to do so by the Act. If this narrow view is sustained, the Commission essentially will be announcing that, contrary to the intent of Congress, Section 312(a)(7) has virtually no force or meaning.

Due to the urgency of this matter and need for a decision sufficiently in advance of the several alternative dates on which time has been sought, it is requested that the Commission address these questions in an open meeting and rule no later than Wednesday, November 14, 1979.

I. *The Networks Ignore the Obvious—This Country's Most Important Political Campaign is Now Underway*

Contrary to the claims of the three networks:

—It is not too early to sell a network half-hour prime time program period. The campaigns now underway to be a party's Presidential candidate are not a series of isolated, local elections, but integrated, nationwide efforts.

—There is not a "multiplicity of candidates" at this time.

—Network entertainment programming will not be unduly disrupted.

First, the simple fact is that the national Presidential campaign is now well underway.* Whether this is philosophically desirable or not, it must be accepted by the Commission and the networks as a fact of life.** This differentiates "Campaign 80" (as characterized by one of the networks) from previous election years and means that the networks cannot simply follow their prior

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* CBS altered or "disrupted" its regular programming schedule to move its one hour CBS Reports program "Teddy", about Senator Kennedy, from Wednesday, November 7, 1979 to Sunday, November 4, 1979 because Senator Kennedy scheduled the formal announcement of his candidacy on November 7, 1979. *Washington Post*, November 3, 1979, p. B-1, 5. As to the announcement, CBS news reported that the Kennedy campaign is now getting into "full swing". In addition, the Des Monies Register and Tribune Company is sponsoring a debate on January 7, 1980 between President Carter and Senator Kennedy, which is expected to receive nationwide coverage. *Washington Post*, November 7, 1979, p. A-1.

** The Commission has recognized that "a presidential campaign may be in full swing almost a year before an election." *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1091 (1978) (hereafter *Enforcing § 312 (a)(7)*). Election Day, 1980 is one year away this week.

practices. In essence, at least two of the networks agree. ABC thinks that the first week in December, 1979 is too early to sell program time, yet one month later—after the Christmas sales season is over—is acceptable to it. CBS agrees that it is appropriate to sell program time now. Its only concern is the amount of time to sell.*

Precisely because the Presidential campaign has started and is so intense, it is particularly unreasonable for the networks to delay selling time until later. The Committee had explained that its reason for seeking a half-hour program, immediately after President Carter formally announces his candidacy, is to present in a detailed and thoughtful manner the administration's record and set the tone for the entire campaign. This purpose could not be accomplished later.

It is unrealistic even to suggest that the Presidential electoral process leading up to the conventions is merely a series of isolated, local and state matters, better dealt with by individual stations. While the pre-convention period focuses on obtaining delegates from the various states, in reality Presidential nominating campaigns are nationwide in scope. Moreover, as network commercial advertisers are well aware, the purchase of network time is the most cost-effective way to reach people. This is a particularly important consideration, given the re-

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* CBS has rejected the requests of *three* Presidential candidates to purchase half-hour programs. Its response was to offer 2 five-minute programs. This has a certain appearance of magnanimity. However, CBS' counter-offer is a clear refusal to sell the Committee the length, day and time period program which would satisfy the Committee's needs. Obviously, CBS did not take into consideration the "candidate's desires as to the method of conducting his or her media campaign." *Enforcing § 312(a)(7)*, 68 F.C.C.2d at 1089, n. 14. It offered a so-called program time unit which it does not sell to its regular commercial customers and which is not even considered a normal program unit by industry standards. See *Humphrey For President Campaign*, 34 F.C.C.2d 471 (1972).

strictions on campaign contributions and expenditures under the election reform laws, of which § 312(a)(7) is only one provision.

Second, it is equally incorrect to contend that there is a "multiplicity of candidates" problem at this time. To support this contention, the networks point to three Democratic candidates and about 11 Republican candidates. This is not an inordinate number, particularly when the Presidency of the United States is the most important elective office in this country and when the networks have access obligations only toward candidates for that office.*

Even assuming that all 13 other candidates would desire to make a similar purchase in December, 1979 (an assumption the Committee does not accept), the three networks would have to make only one half-hour, per week, per network available.** This would involve only 13 additional prime-time half-hours out of a total of 528 prime-time half-hours over any four week period. This is only 2.5% of the total December television time under the networks' effective control.

Furthermore, because the networks would be acting on behalf of their affiliates, they would be assisting in-

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* In contrast, CBS has pointed out the numerous federal offices, in three states, towards which its O & O, WCAU-TV, Philadelphia has access responsibilities. (CBS Response, p. 11, footnote). This is no doubt typical of the responsibilities of other network O & O stations as well as network affiliated, independent and educational stations across the United States. Individual stations have to be concerned with a larger number of federal offices than the networks, without even considering the stations' obligations toward state and local elections.

** While the Committee requested availabilities on all three networks, it seeks to purchase a half-hour program on only one of the networks. Because of the very high costs involved, there is no reason to believe that other candidates would act differently.

dividual stations (who have access obligations covering many other federal elections) in meeting a good portion of their access obligations toward these Presidential candidates. As it stands now, the networks by their intransigence do a disservice to their affiliates.

Finally, the validity of a "disrupted program schedule" defense is most questionable, even were the potential for disrupting the networks' entertainment programming schedules substantial (which is not the case here). The Committee felt that it gave the networks considerable leeway in providing availabilities. The possibility that other candidates, from both parties, might request time is speculative at this point. Moreover, the networks admit that ultimately they must make scheduling changes and, in fact, now do so with regularity for their own commercial purposes.

II. *The Reasons Given by the Networks for Their Refusals are, in Fact Reasons to Grant the Request*

All three networks argue that they should not be required to sell the Committee a one half-hour period at this time because it is too early in the campaign and there is a multiplicity of candidates. As shown above, these concerns are not borne out by the facts. But even if it were assumed otherwise, they provide little support for the networks' position. If a true "multiplicity of candidates" problem existed, there would at least be a responsibility to try to solve the problem to the maximum extent possible, particularly where a Presidential candidate's statutory rights are involved. One of the best ways to do this would be to start selling or making available time early in the campaign to maximize opportunities and minimize disruptions.

The networks cannot have it both ways. If there are a large number of potential candidates, they should ad-

just their selling practices accordingly to accommodate candidates' anticipated needs. On the other hand, if the networks really believe that the campaign period has not started yet, then they must be prepared to accept the consequences of disrupted schedules (in line with their restricted view of the campaign period) when there is less time left to meet candidates' needs.

Moreover, of all the broadcasters in this country, the networks are in the weakest position to raise a "multiplicity of candidates" defense to making time available to candidates. Unlike other licensees, the networks as the national medium have only one group of candidates to serve (Presidential candidates).* And from the practical standpoint, the networks have access to at least two-thirds of the available hours on affiliated stations. Therefore, they have more time under their effective control than does the typical station in which to meet their one statutory obligation to candidates for this uniquely important office.**

III. *The Networks Place Excessive Reliance On The Traditional Licensee Discretion Concept*

The networks defend their refusals to sell time as a reasonable exercise of the broad discretion accorded them under the Communications Act. They fail to recognize, however, that the traditional concept of licensee discretion in making time available to candidates was modified by Congress in enacting Section 312(a)(7) as

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* This office also happens to be the most important from the standpoint of the public whose interests are paramount here.

** On the other hand, other licensees, in addition to the Presidential candidates in state primaries, will have "reasonable access" obligations to numerous congressional and senatorial candidates, as well as basic licensee obligations to important state and local candidates. See page 4, *supra*.

far as federal candidates were concerned.* The addition of this provision was not just a limited amendment to the Communications Act but an important component of the most comprehensive statutory reform of the entire federal elective process in nearly fifty years. As reflected in the accompanying legislative history, the need for this reform was occasioned in large measure by the increasing role and cost of broadcasting and particularly the critical importance of television to the entire electoral process.**

The legislative history surrounding this reform clearly demonstrates that Congress was dissatisfied with the *status quo* under the then existing Communications Act which placed great reliance on the concept of licensee discretion in serving the needs of candidates.*** There can be no doubt but that the essential purpose of enacting Section 312(a)(7) was to place new and additional obligations on broadcasters with respect to candidates for federal elective office.

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* The Committee is seeking to *purchase* a half-hour program. In this context, Section 312(a)(7) requires that candidates be accorded the right to purchase "reasonable amounts of time." This is to be contrasted with other provisions of the Communications Act which have been traditionally interpreted to afford licensees far greater discretion in their activities.

** That Congress appreciated and was concerned over this role is shown by its first effort in 1970 which concerned itself solely with political broadcasting. It was vetoed on the ground that a more comprehensive approach covering other media and electoral problems was required.

*** Under the then existing statutory scheme, the Commission's role was generally limited to reminding broadcasters of their general statutory obligation to make time available to political candidates in accord with their reasonable, good faith judgment of the situation. See, *Public Notice, Licensees Reminded Of Statutory Obligations In Contributing Time To Political Campaigns*, 13 RR 2d 1216 (1968).

Thus, in reporting the measure to the Senate, the Committee on Commerce unequivocably stated that it sought ". . . to give candidates for public office *greater* access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." * It is particularly noteworthy in this respect that every specific ruling cited by the networks in defense of their refusals predate the Commission's 1978 *Policy Statement, (Enforcing § 312(a)(7))*, which accepted and restated this view.

We readily concede that the networks and other licensees need to have some latitude in handling requests for political time. But by the same token, we believe that the networks must also concede that the traditional role of the licensee in these matters has been significantly modified by the actions of the Congress in addressing, in a most comprehensive way, this country's basic electoral process.**

CONCLUSION

For these reasons and for those stated in our initial complaint, the facts of this situation require the Commission to determine that the three networks have failed ". . . to permit purchase of reasonable amounts of time

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* Report of the Senate Committee on Commerce on S.382 (P.L. 92-5), page 20 (emphasis added).

** For example, as far as the time period for the conduct of federal campaigns is concerned, Congress specifically rejected proposals to limit the length of the campaign period (as is done, for example, in Great Britain) but instead contemplated that candidates would determine this period, provided the Federal Election Campaign Act and the rules and regulations of the Federal Election Commission are satisfied. The Committee believes it is simply unlawful to permit the networks effectively to make judgments which were not even entrusted to the federal agency responsible for the supervision of the electoral process.

. . ." and accordingly direct the networks to make time available for purchase.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
Ramsey L. Woodworth
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

November 7, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB) urges the Commission to find that the refusal by the three major television networks, ABC, CBS and NBC, to sell the Carter-Mondale Presidential Committee a half-hour of prime time for nationwide broadcast was neither unreasonable under Section 312(a)(7) of the Communications Act[1] nor an abuse of the journalistic discretion properly vested in their stations as licensees.

NAB is a private nonprofit, incorporated association of radio and television broadcast stations and networks. As of November 7, 1979, NAB's membership included 2,553 AM radio stations, 2,030 FM radio stations, 600 television stations and the major nationwide commercial broadcast networks. Because the FCC's action on the complaint will have an impact on all radio and television stations, NAB is submitting these comments, as an *amicus curiae*, to underscore the interest of broadcast licensees in this proceeding. We urge the FCC not to take any action which unduly circumscribes the reasonable good faith judgment of broadcast licensees.

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[1] Section 312(a) provides that: "(a) The Commission may revoke any station license . . . (7) For willful or repeated failure to afford reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Significantly, Section 312(a) is directed to stations rather than to the networks.

I. *The Reasonable Access Requirement Should Be Interpreted in Light of the First Amendment Interest in Shielding a Broadcaster's Journalistic Decision from Government Second-Guessing.*

The reasonable access requirement is essentially a codification for Federal candidates for public office of "the Commission's prior interpretation of Section 315 (a) as requiring broadcasters to make time available to political candidates." [2] Congress recognized that the rights of Federal candidates to time should not be absolute and provided that *licensees* could limit such candidates to a "reasonable" amount of broadcast time. However, even though Congress provided little guidance on the meaning of the phrase "reasonable," it empowered the FCC to revoke the license of any station for "willful or repeated failure" to comply with Section 312(a)(7). With the sanction of license revocation expressly contained in Section 312(a)(7), the potential for government harassment is indeed significant.

A mounting series of court decisions have upheld the vital First Amendment interest in shielding journalistic decisions made by broadcasters and newspaper publishers from Government second-guessing. In the landmark *CBS vs. DNC* case, the U.S. Supreme Court warned against "the risk of an enlargement of Government control over the content of broadcast discussion" as well as the dangers of Government oversight of "the day-to-day operations of broadcasters' conduct." [3] The Court observed that "[r]egimenting broadcasters is too radical a ther-

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[2] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-114 n. 12 (1973). *See also* S. Rep. No. 96, 92nd Cong., 1st Sess. (1971) and 117 Cong. Rec. S12872 (daily ed. Aug. 2, 1971).

[3] 412 U.S. at 126-127.

apy"[4] and emphasized the importance of providing licensees with the utmost discretion:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material."[5]

The issue of Government review of a licensee's journalistic judgment was also addressed by the Supreme Court in a decision invalidating a Georgia privacy law on the ground that it infringed upon the First Amendment right of the petitioning broadcast station to report information disclosed during a criminal trial. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Citing its decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating on First Amendment grounds a Florida statute providing a right of access for candidates to newspapers), the Court concluded: "In this instance as in others, reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox* at 496.

The necessity of giving the licensee a substantial amount of leeway on matters relating to issues of importance to the electorate was underscored by the U.S. Court of Appeals for the District of Columbia Circuit in *Strauss Communications, Inc. v. FCC*:[6]

> The abiding First Amendment difficulties, however, along with an appreciation of Congress' intent in enacting the Communications Act, have engendered an important corollary: the licensee is to have the maximum editorial freedom consistent with its position as public trustee of a portion of the airways.

Accordingly, it is of utmost importance that the reasonable access provision be interpreted by the Commission

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[4] *Id.*

[5] *Id.* at 124.

[6] 530 F.2d 1001, 1008 (D.C. Cir. 1976).

in this case in light of a standard which gives great weight to the editorial discretion of broadcasters.

II. *The Commission Should Continue to Defer to the Reasonable, Good Faith Judgment of Licensees.*

For the Commission to rule in favor of the complainant would clearly require that it substitute its own judgment for that of the networks. While the Carter-Mondale Presidential Committee would like to place the burden of justification on the broadcaster, this approach is wrong as a matter of law. The Commission has emphatically stated, again and again, that it will not overturn a licensee's good faith discretionary judgment unless it is clearly unreasonable in light of all the facts and circumstances. This policy was initially stated by the Commission in a 1972 Public Notice entitled *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*:[7]

> The test of whether a licensee has met the requirements of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.

Affording the licensee significant journalistic discretion has been a fundamental part of the Commission's regulatory scheme.[8] This is only as it should be in light of the mandates of the First Amendment and the no-censorship provision (Section 326) of the Communications Act. The need to accord great latitude to the judgment of the broadcaster as to what constitutes reasonable access is underscored by the severity of the ulti-

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[7] 34 FCC 2d 510, 536 (1972).

[8] *CBS v. DNC, supra*, at 110-111.

mate penalty for violation of Section 312(a)(7). In addition, the equal opportunities provision (Section 315) of the Communications Act and the Fairness Doctrine impinge upon the reasonable access provision and make it difficult to implement, especially when there is a multiplicity of candidates for Federal office.

NAB believes that the deference the Commission has given to the licensee's good faith and reasonableness remains an entirely appropriate standard. Indeed, the following facts, all amply documented in the networks' three submissions, highlight the enormous problems which would ensue from upholding the complaint:

—the extraordinary number of candidates, each potentially capable of asserting a colorable "equal opportunities" claim under Section 315;

—the unprecedented earliness of the request;[9]

—the inability of the Commission to specify, as a matter of law, the many factors to be considered by a licensee (or a network) in determining whether, when and how much time to sell to a political candidate;

—the geographical sloppiness of political boundaries (*see*, e.g., CBS Comments at 11 & n. *); broadcast stations' service areas rarely coincide neatly with the candidate's targeted voting population;[10]

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[9] By way of comparison, in the 1976 campaign the earliest political "program time" ABC sold was aired on April 23, 1976 (ABC Comments at 9), and the first political half-hour NBC sold was broadcast on March 31, 1976 (NBC Comments at 2). CBS has already offered the complainants two 5-minute program time slots in early December, 1979 (CBS Comments at 1).

[10] For instance, to secure adequate and effective television exposure in the pivotal state of New Hampshire, a candidate would have to buy time on stations located in Boston, Massachusetts; Portland, Maine; Poland Springs, Maine; Burlington, Vermont; Lebanon, New Hampshire; and perhaps Albany, New York. The

—the special inappropriateness of demands for time on the national networks nine full months before the first relevant national political event (the Democratic Convention, August 11-14, 1980);

—competition in time demands from candidates for state and local offices; which the licensee may properly adjudge of greater immediate concern to his community (*see infra* at III);

—the availability of other media, broadcast and non-broadcast;

—the not inconsequential disruption of regularly scheduled programming, with the threat of having to hastily substitute quickly-produced filler for longstanding, suddenly ousted, series;

—and most importantly, the observation that all three networks—and local stations as well—cover the U.S. Presidency through their news departments continuously, 365 days a year.

This final consideration underlines the cardinal importance of the Commission's allowing broadcasters flexibility in determining when and how much time they will currently sell to Presidential candidates. The issue is not whether the FCC agrees with the decisions of the three networks but whether the Commission can make a finding that the networks can be said to have acted in good faith.

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[10] [footnote continued]

more populous state of New Jersey offers an even more dramatic spillover problem, lacking as it does even a single commercial VHF outlet.

III. *Licensees Should Be Allowed Flexibility in Balancing Requests for Access by Federal Candidates With Other Types of Programming and in Determining When Access Should begin to be Granted.*

The reasonable access provision only applies to Federal races. During any regular election period, of course, numerous candidates for state and local public offices will also want air time. In some cases, local elections may eclipse Federal ones in urgency or interest. As stated by the Commission in *Daniel Walker:* [11]

> It is the duty of each licensee to determine which campaigns and/or elections are of the most importance and interest in its service area and to devote a reasonable amount of coverage to those campaigns and/or elections.

In addition to those requests for time by candidates for Federal, state and local offices, broadcasters serve the public interest by carrying other types of programming. Thus, the Commission has stated:

> [I]mportant as an informed electorate is in our society, *there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be pre-empted for political broadcasts.*[12]

The standard by which a licensee's selection of programming is to be judged was set forth in *Summa Corporation:* [13]

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[11] 57 FCC 2d 799, 800 (1975).

[12] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 FCC 2d at 536.

[13] 43 FCC 2d at 602, 604 (1973).

> [W]here a licensee's judgments or policies under the circumstances represent a reasonable, good-faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7).

The basic issue posed by the Carter-Mondale complaint is not whether any particular Federal candidate is entitled to access but when access must be granted. The Commission, in a recent interpretive ruling on when a licensee's obligation to afford reasonable access begins, stated that "a licensee would be unreasonable if it refused to afford access to Federal candidates at least during those [statutory] time periods" when the lowest unit charge provision of Section 315 is applicable (namely, 45 days prior to a primary election and 60 days prior to a general election).[14] As to whether "reasonable access" must be afforded before those periods, the Commission stated that this was a determination which "must be made in each case under all the facts and circumstances present."[15] The Commission also commented that it had "received no Congressional guidance as to when Section 312(a)(7) should be effective prior to a convention or caucus since the 'lowest unit charge' provision applies only before election."[16] Recognizing the "large variation in procedures utilized for obtaining nomination through such methods," the Commission did

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[14] *Report and Order In the Matter of Commission Policy In Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 43 RR 2d 1029 (1978).

[15] 43 RR 2d at 1045, 68 FCC 2d at 1091.

[16] *Id.*

not suggest any time limits on access in such situations, and simply commented that licensees would be expected "to afford access at a *reasonable time prior to a convention* or caucus." [17] As noted earlier in our Comments, the Democratic National Convention will be held on *August 11-14, 1980*. Surely, the decisions of the networks that they would not begin to sell half-hour political programs to Presidential candidates seeking nomination at the 1980 national political conventions until early 1980 is clearly not unreasonable, especially in view of the nature and length of the Presidential campaign and the multiplicity of candidates who are already participating in that campaign.[18]

IV. *Conclusion.*

The Carter-Mondale complaint, while limited to the networks, involves issues of vital importance to all broadcast stations. As we have shown, the legislative history of Section 312(a)(7) as well as past Commission and court decisions, sensitive to First Amendment principles, clearly indicate that the responsibility of weighing competing requests for access and determining an appropriate allocation of the limited amount of time available properly lies with the licensee. Accordingly, NAB urges the Commission to continue to adhere to its

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[17] *Id.* (emphasis added).

[18] As the essayist and political observer Leonard Silk has observed:

> The entries in the Presidential sweepstakes are off and running. Never before in the memory of political handicappers has the race started so early and so furiously. With the erosion of party discipline and insider control, the contest for the Presidency has taken on the character of a large national advertising campaign.

"Inflation Views of Candidates," *New York Times* (November 7, 1979) at D2.

policy of allowing broadcasters significant flexibility in determining when and how much time they will sell to federal candidates.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street N.W.
Washington, D.C. 20036

ERWIN G. KRASNOW
Counsel

Bruce MacEwen
Stanford Law Student
Intern

November 8, 1979

[Certificate of Service Omitted in Printing]

[LETTER FROM CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.]

CARTER-MONDALE PRESIDENTIAL
COMMITTEE, INC.
1413 K Street, N.W.
Washington, D.C. 20005

November 9, 1979

Mr. William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: *Complaint of Carter-Mondale Presidential Committee, Inc.*

Dear Mr. Tricarico:

This morning, Counsel for the Committee was served with comments filed by the National Association of Broadcasters supporting the networks' refusal to sell the Committee the one half-hour which it had requested. These comments largely duplicate the arguments made by the three networks to which we have already replied; therefore, neither an extensive response nor a delay in the consideration of the complaint is required.

However, we do wish to make three brief points. First, to the extent First Amendment considerations are involved in this matter, they firmly support the Committee's complaint. The basic thrust of Section 312(a)(7) promotes and furthers the goals of the First Amendment by providing the public with access to the ideas and positions of political candidates, thereby fostering an informed electorate.

Second, the "business as usual" approach of the NAB to the positive duties imposed upon broadcasters by Sec-

tion 312(a)(7) shows the importance of the issues raised by the Committee and the need for a definitive ruling by the FCC at this time. The position that this section is merely a "codification" of existing law, intended to maintain the *status quo*, has specifically been rejected by the Commission. See *Enforcing § 312(a)(7)*, 68 F.C.C. 2d 1079, 1088 (1978).

Third, the NAB's concerns for its membership go far beyond the precise issue which is now before the Commission—the obligations of the three commercial networks to the one set of candidates (Presidential candidates) for which they have statutory access obligations. Indeed, as we have previously pointed out, the networks' present intransigent position makes it more difficult for NAB's individual licensee members to fulfill their obligations.

Very truly yours,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential Committee, Inc.

Of Counsel:

John D. Lane
Ramsey L. Woodworth
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

MEDIA
ACCESS
PROJECT

1609 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 232-4300

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

COMMENTS OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

The National Citizens Committee for Broadcasting (NCCB)[1] by its counsel, the Media Access Project, hereby presents comments for consideration in the above-cited proceeding.

On October 29, 1979, the Carter-Mondale Presidential Committee, Inc. (Committee) filed a complaint against

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[1] The National Citizens Committee for Broadcasting is a Washington, D.C.-based, non-profit public interest group with a national membership of 10,000 individuals and media reform groups. NCCB's members have an interest in receiving contrasting views on issues of public importance, including opposing viewpoints of candidates for public office. NCCB has participated in other proceedings before the Commission, including its recent Request for a Declaratory Ruling that Ronald Reagan for some time has been a legally qualified candidate, for equal opportunities purposes, for the Republican presidential nomination, prior to his formal announcement, now scheduled for tonight (see Attachment A to these Comments); and its Petition for Rulemaking seeking an amendment to the definition of "legally qualified candidate" contained in Section 73.1940(a) of the Commission's Rules. The Commission's Memorandum Opinion and Order denying both matters was released August 15, 1979, and NCCB's appeal to the U.S. Court of Appeals for the District of Columbia Circuit was docketed on November 7, 1979 (No. 79-2112).

the three commercial networks for refusing to provide access, as required by Section 312(a)(7) of the Communications Act. ABC and NBC filed responses on November 5, 1979, and CBS filed a response on November 6, 1979. On November 8, 1979, the National Association of Broadcasters (NAB) filed comments, and the Committee filed its reply to the networks' responses. NCCB's comments address the issues raised in those filings, and are offered in support of the Committee's Complaint.

The Carter Committee, in letters dated October 11, 1979, asked each of the networks to provide one half-hour of prime time during the first week in December, nearly two months later. The Committee intended (Complaint, page 2) to use only one half hour on one network, "after reviewing the availabilities." The Committee expressed its interest in any half hour between 8 p.m. and 10:30 p.m. on either December 4, 5, 6, or 7 (see Attachment A to Complaint). Thus it was willing to accept any one of 60 half-hour segments out of the three networks' total weekly availabilities of 132 half hours. Moreover, as explained in the Complaint, the Committee intentionally avoided requesting time during the national ratings sweep period (Complaint at 3), and sought only one half hour, not a series of broadcast segments ("It does not intend to make such purchases a regular practice," Complaint at 8).

Despite the Committee's two-month notice and its willingness to accept any of nearly half of the half-hour segments the networks broadcast, all three networks turned down the request for access. (Network letters are Attachment B to the Complaint.) CBS, on October 17, 1979, explained its refusal to provide the requested half hour on the basis of the "large number of present and potential candidates for the Republican and Democratic presidential nominations, since "accommodating potential requests for equal treatment from other candidates would involve massive disruptions of the regular entertainment

and information schedule of the CBS Television Network." CBS did agree to make one five-minute segment in prime time available for purchase on December 8 at 10:55 p.m. (this five-minute slot on Sunday evenings is generally a period of low viewership), and one five-minute daytime segment. CBS had earlier made this same offer to certain Republican presidential candidates.[1]

ABC and NBC both responded in letters dated October 23. Both indicated their belief that December is too early to begin a presidential campaign.[2] In ABC's words: "the ABC Television Network has not reached a decision as to when it will start selling political time for the 1980 Presidential Campaign . . ." but probably "a decision will be made to make political time for the Presidential Campaign available on ABC-TV early next year." Similarly, NBC stated: "Based upon our experience with past campaigns, we believe it is too early in the political season for nationwide broadcast time to be made available for paid political purposes."

Faced with these refusals, the Committee filed its Complaint with the FCC two weeks ago.

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[1] At least one of these, Ronald Reagan, had similarly requested a half hour in prime time. Turned down by the networks, he has purchased time on a large number of independent stations for broadcast tonight. See Attachment A hereto.

[2] CBS, which has offered five-minute segments to certain candidates and which broadcast an hour-long program on Senator Kennedy's candidacy during prime time on November 4, 1979 (Reply, at 2, n.*), obviously disagrees. So do the independent stations in the three-fourths of the nation's television markets that will reportedly air the Reagan political broadcast tonight. See Attachment A hereto. Moreover, the Carter filings imply that the other two networks may be somewhat disingenuous in premising their refusals to sell time on the basis of what they term a "premature" request, since ABC carried 51 minutes, 22 seconds on the presidential campaign between September 1, 1979, and October 9, 1979, and NBC carried 70 minutes. Complaint at 4 and Attachment A thereto.

The Committee contends that Congress intended that candidates, not broadcasters, should determine when campaigns begin and when political broadcast time should be purchased (Complaint at 4 and Reply at 8). NCCB agrees. The Federal Election Campaign Act, of which Section 312(a)(7) was a part, was enacted to facilitate the development of an informed electorate by giving "candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." (117 Cong. Rec. 512872 (daily ed., Aug. 2, 1971), cited with approval by the Commission in *In re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, BC Docket 78-102, July 31, 1978, para. 31.) While candidates are entitled to determine when their campaigns begin,[1] as the Committee has stated, it is the

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[1] Although this determination need not be demonstrated by means of a formal announcement of candidacy, as argued in NCCB's previous filings; noted on page 1; as recognized in the Commission's order thereto (FCC 79-440), which stated:

> some actions are the equivalent of a public announcement [citing *Law of Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2229 (1978)] . . . . We are not pursuaded that the Commission would be helpless under the present rule if a candidate should campaign actively, fulfill all the other requirements of candidacy and yet attempt to defeat his rivals' equal opportunities rights by not formally announcing. If such a candidate filed the necessary papers to qualify for a place on the ballot for a state primary, he would be deemed to have publicly announced. By the same taken, if he made a substantial showing that he was a candidate, as set forth in 73.1940 (a)(5), it is quite possible that the Commission would find that his statements or perhaps even his behavior constituted the equivalent of a public announcement. On that basis the Commission might further find him legally qualified under our rules. Moreover, if a person "has engaged to a substantial degree in activities commonly associated with political campaigns [such as] making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee and establishing campaign headquarters"

viewers' rights to be informed by means of the broadcast media that were the basis for the enactment of Section 312(a)(7) and that are primarily violated by the networks' refusal: "More importantly, it denies the public the opportunity of hearing and seeing the candidates in the manner which they have chosen to appear." Complaint at 2.

The arrogance of the networks (and their representative, the NAB) that is so apparent in their letters to the Committee and their filings to the Commission is precisely why Congress had to enact Section 312(a)(7) and why the choice about when to air political broadcasting very properly has not been left to the broadcasters. As the Commission has stated, "Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access." *Commission Policy in Enforcing Section 312(a)(7)*, *supra*, at n. 14 to para. 39. It should be obvious that if the networks so brazenly refuse to provide paid access upon request by the nation's president, it is all the more unlikely that the networks will agree to provide access to major party challengers or third-party candidates. And it is the rights of these candidates and the public's rights to hear their views that Section 315 was long ago enacted to protect.

> it is difficult to envision that during these activities he would not indicate that he is a candidate (Order, paras. 12-13);

and as acknowledged by the Committee:

> Since none of the three networks are contending or basing their refusal on a claim that President Carter is not a "legally qualified candidate" at this particular time—it is not an issue here. Nevertheless, the Commission should be aware that the Committee can establish that President Carter satisfies the requirements of the Commission's rules as set forth in section 73.1940 [even though no] formal announcement has been made." (Complaint at 3-4.)

Singer, *The FCC and Equal Time*, 27 Md. L.Rev. 221 (1967).

The 1980 election promises to be one of the most vigorously contested in recent years. There can be no doubt that appearances by candidates that are broadcast on the media are likely to have a profound impact on which persons succeed in getting their parties' nominations and ultimately in winning the election.[1] The presidency is a uniquely national office: the media coverage given a delegate contest in one state unquestionably affects the outcome in other states and ultimately shapes the electorate's views. With no clear indication at this time of who will obtain either party's nomination, this is one of those years that conforms to the Commission's observation that "a presidential campaign may be in full swing almost a year before an election." *Commission Policy in Enforcing Section 312(a)(7)*, *supra*, para. 45. The Commission should find that the current presidential campaign is in full swing and the networks' willful refusal to provide a half hour of prime time[2] to the Committee violates Section 312(a)(7).

NCCB further requests that the Commission clarify two points of law on which there appears to be some confusion. First, although the networks may feel they have a responsibility to provide time to all legally quali-

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[1] For example, President Carter and Senator Kennedy have agreed to debate in a televised presentation on January 7, 1980, a debate expected to be broadcast nationally by one or more of the networks. Reply at 2, n.* and Attachment B hereto.

[2] The Commission's *Policy in Enforcing Section 312(a)(7)* concluded that: "Licensees must provide prime-time program time absent unusual circumstances" and "Licensees may not have a policy of flatly banning Federal candidates from access to the types, lengths and classes of times which they sell to commercial advertisers." Para. 55(b) and (c).

fied candidates once they provide time to Carter,[1] and although NCCB supports wide accessibility of the media to candidates, in fact the law is clear that a network's act of providing a half hour to Carter only obligates that network to provide equal opportunities to the two other legally qualified candidates for the Democratic presidential nomination, Senator Kennedy and Governor Brown.[2]

Second, there may also be some confusion as to whether President Carter will be a legally qualified candidate after he announces his intention to seek re-election, if he is not already a legally qualified candidate under Section 73.1940(a) of the Commission's Rules. That Section appears to set three prerequisites that must all be met before equal opportunities apply:[3] public announcement, qualifying for the office, and qualifying for a place on a ballot or otherwise demonstrating the seriousness of a candidacy. Yet in its Order denying petitioner's Petition for Rulemaking to amend Section 73.1940(a), the Commission stated that contrary to the explicit language of the Section, the three prerequisites in fact are not all essential elements in every case.[4] Since NCCB does not believe President Carter has yet qualified for election in the 10 states that Section 73.1940(a) expressly requires before a candidate may be considered

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[1] *See, e.g.*, NBC Response at 2, ABC Response at 5, CBS Response at 9, and NAB Comments at 7. A related point of confusion appears in the Committee's Reply at 4-5, which suggests that if one network were to provide the requested half hour, the other two could help satisfy the equal opportunities invoked thereby.

[2] *Law of Political Broadcasting and Cablecasting, supra,* 69 FCC 2d 2209, 2218.

[3] There is no reason to think that the definition of "legally qualified candidate" for Section 312(a)(7) purposes is in any way different. No rules have been promulgated under that Section.

[4] Order at paras. 12-13, quoted above.

a legally qualified candidate in all states (and therefore, before a network providing access may be required to provide equal opportunities to other legally qualified candidates), the network broadcast, if provided, may not lead to Section 315 obligations. This result has not been suggested in any of the previous filings in this matter, and may not be what the Commission intends the effect of its Rules to be. Therefore, NCCB once again respectfully asks the Commission to clarify whether a presidential candidate now or by December 4, 1979, is likely to be a legally qualified candidate for equal opportunities and reasonable access purposes.

Respectfully submitted,

/s/ Heidi P. Sanchez
HEIDI P. SANCHEZ
MEDIA ACCESS PROJECT
1609 Connecticut Ave., N.W.
Washington, D.C. 20009
202-232-4300

Attorney for National
Citizens Committee for
Broadcasting
1530 P Street, N.W.
Washington, D.C. 20005

November 13, 1979

ATTACHMENT A

THE WASHINGTON POST *Sunday, November 11, 1979*

REAGAN DUE TO REWRITE LOW-KEY SCRIPT TUESDAY

BY LOU CANNON
Washington Post Staff Writer

When a West Coast reporter complained recently to Ronald Reagan's campaign manager, John P. Sears III, that Reagan had not said anything new in months, Sears smiled and shot back, "I certainly hope he hasn't."

And when the 68-year-old Reagan was asked a few nights later what he would do to disabuse voters of the notion that he is too old to be president, Reagan quipped, "Skip rope through the neighborhood."

These statements epitomize the take-it-easy, say-nothing strategy Reagan has followed with few deviations since he formed his fund-raising "exploratory committee" eight months ago. Enjoying his favored status as Republican presidential frontrunner, Reagan has been content to stay on the sidelines through most of 1979.

Now, however, the script is about to change.

Tuesday night, before a Republican fund-raising dinner at the New York Hilton Hotel, the former California governor officially will unfurl his candidacy and then embark on a five-day, nine-state tour in which he has promised to discuss issues and answer what Sears expects will be "sharp and challenging" questions by the press.

Because Reagan has said so little for so long, and because the new speech will be televised to much of the nation Tuesday night, his managers see the Reagan launching as a pivotal event.

With the spotlight on him, a man who would turn 70 within a month of his inauguration as president will seek to demonstrate that he is an appropriate candidate for the 1980s. He must also, in Sears' words, "get people to look up a little bit" while showing that he has the vitality, ideas and capacity to serve as president of the United States.

"When the central question is leadership," says Sears, "the candidate must be perceived as someone who can solve the problems."

This means, in Sears' view, a speech that shows Reagan is neither too old nor too old hat. It would be a difficult maneuver because Reagan also is trying to remind the faithful supporters who have been with him since his "island of freedom" speech for Barry Goldwater in 1964 that he is not abandoning principles to capture an ill-defined center.

"There wouldn't be any point in even considering this race if I were willing to change what I believe in order to garner a vote here and there," Reagan said recently.

Nonetheless, the Tuesday speech is designed to present another Reagan, if not a new one, a Reagan who is supposed to offer both fresh ideas and new leadership.

Sears believes that the Democratic Party, "the major poiltical institution that's been running the country for the past 50 years has run out of ideas." If the GOP can capitalize on this, he adds, it will start winning elections it has been losing.

Reagan may find it easier to solve the ideological equation than to answer questions about age or fitness. As an eight-year governor of the nation's most populous and diverse state, he compiled a record more moderate than his national rhetoric suggests.

A survey taken when Reagan left office found him highly popular with moderate Republicans and with many Democrats.

Sears further suggests that many of Reagan's positions on both economic and national defense issues are more popular now than they were when Reagan first took them.

Whenever Reagan is trying to convince the voters of anything, he turns to television—and this will be his principal reliance this week.

On Monday afternoon he will [illegible] the same half-hour speech he will give to the GOP fund-raiser the following night. It will be seen Tuesday night in three-fourths of the nation's television markets at a production and distribution cost of more than $400,000. The Reagan campaign put together its independent network after the major networks refused to sell the time.

Sears, who played an important management role in Richard M. Nixon's successful 1968 presidential campaign and almost pulled off a Reagan upset of President Ford in the 1976 primaries, is not leaving the perceptions of Reagan to chance.

As Reagan tours the Northeast and Midwest next week, Sears will unveil endorsements from moderate GOP leaders designed to convince skeptics that a Republican bandwagon is forming behind Reagan.

"We should take advantage of being a frontrunner," Sears said in an interview Friday. "Others don't have that luxury."

Sears' comments are studded with references to other frontrunners who tried to sit on their supposed leads—notably Republican George Romney in 1968 and Democrat Edmund S. Muskie in 1972—and he does not intend to have Reagan repeat their mistakes.

"You have the problem, especially if you're the front-runner, of maintaining the discipline to say precisely what you mean," Sears said. "You can't let down. If you're off by one hair, it will cause problems. I'm not worried that Reagan will make a fatal error but even if you make a small error, the time spent going back on it will be a hinderance."

Reagan has made his share of mistakes in two previous campaigns for the presidency and two races for governor of California. But he is, on the whole, a polished campaigner who holds his own in interviews, especially on television.

While some have suggested the Sears strategy for 1980 resembles Nixon's campaign of 1968, Sears insists that is not fair.

To say that Nixon in 1968 was controlled is mild," says Sears. "He didn't make any news and he declared moratoria on a number of issues. We're not in that position. We expect to make news.

"It wouldn't be good to try to hide," he added.

Reagan's schedule next week is demanding. After his Tuesday night speech in New York, he flies to Washington around midnight. He plans a press conference at 10 a.m. the next day in the Senate's Dirksen Office Building.

Then he plans to depart for rallies in Boston and Manchester, N.H., returning to New York the same night. Before the week is out and he returns to his home base in Los Angeles, Reagan will have visited Philadelphia, Chicago, Milwaukee, Grand Rapids, Mich., Atlanta and the Florida GOP presidential preference convention in Orlando.

In his California campaign, Reagan was known as a candidate who could endure a grueling schedule for a short time, as long as it was followed by a period of

rest. Those who know Reagan say this may be a by-product of his work schedules in the movie business and its common pattern of intense periods of hard work followed by long spells of inactivity.

After his first week of campaigning, Reagan is scheduled to take a week off and then hit the trail again for five days in a cross-continent schedule that includes stops in Alaska, Minnesota, Arkansas and Alabama. He plans light campaigning in December, including a probable stop in Iowa, and then heavier, more constant campaining after the first of the year.

Washington Post staff writer Dan Balz and researcher Katherine Macdonald contributed to this story.

ATTACHMENT B

THE WASHINGTON POST

WEDNESDAY, NOVEMBER 7, 1979

January Faceoff Will Come Before Caucus Voting

KENNEDY, CARTER AGREE TO IOWA DEBATE

BY EDWARD WALSH
Washington Post Staff Writer

President Carter and Sen. Edward M. Kennedy (D-Mass.) agreed yesterday to a debate in Des Moines in early January, two weeks before Iowans meet in precinct caucuses to begin the process of selecting their party's presidential nominee.

Carter was the first to accept an invitation from the Des Moines Register and Tribune for an appearance with Kennedy. A short time later, the Massachusetts senator, who formally will declare his presidential candidacy today, accepted the challenge.

Kennedy, en route to Boston for his announcement, said, "I think it's appropriate to have the debate. I've always debated in the past. I think anybody who seeks the presidency should debate, and I'll look forward to that opportunity."

James Gannon, executive editor of the Register and Tribune, said the debate is being planned for a night during the week of Jan. 7 in the 2,500-seat Des Moines Civic Center. While the details have not been settled, he said that questions would be posed to the candidates by a panel of four reporters, two from the Register and Tribune and two national correspondents, followed by questions from the audience.

Gannon predicted that the national television networks will find the first face-to-face confrontation between the

president and his leading challenger irresistible, turning the Iowa event into a national political spectacle.

The third Democratic presidential contender, California Gov. Edmund G. (Jerry) Brown Jr., was not invited to the debate because he "has not mounted any campaign here that is discernible," Gannon said.

The Register and Tribune, Iowa's dominant and most influential daily newspapers, also have invited seven Republican presidential hopefuls to appear in a similar debate format the afternoon of Jan. 5. Gannon said tentative acceptances have been received from several of the Republicans and predicted that there will be a GOP debate involving at least some of the candidates.

Iowa Democrats and Republicans will meet in precinct caucuses Jan. 21 to select delegates to later district conventions and the state conventions that eventually will send Iowa delegates to the national party nominating conventions next summer.

The debate could raise the importance of the Iowa political battlefield far beyond the 30 Democratic convention delegates to be chosen in the state. It is certain to attract intense media coverage and have an impact on later states where Kennedy and the president will meet in primaries.

White House and Carter campaign officials have been considering challenging Kennedy to a debate for some time. They clearly preferred not to issue the challenge themselves, but to find a neutral sponsoring party, such as the Register and Tribune.

The event clearly fits the president's needs, his advisers believe. While Kennedy is considered a better stump speaker, Carter's aides believe the president's strength is in the question-and-answer format, which he has used successfully in his town meetings around the nation.

Carter won a Democratic straw poll in Iowa last Saturday with 70 percent of the vote and is considered to be far ahead of Kennedy in organizational strength there. But public opinion polls earlier in the fall showed Kennedy leading Carter by a substantial margin in Iowa.

In other political developments yesterday, White House press secretary Jody Powell confirmed that Robert S. Strauss, the administration's special ambassador for the Middle East peace negotiations, is resigning to become * * * [Illegible] * * *

Powell also confirmed that Strauss will be replaced in the diplomatic post by Sol M. Linowitz, who helped negotiate the Panama Canal treaties.

Meanwhile, Carter campaign officials announced that S. Lee Kling, a longtime aide to Strauss, would become the campaign committee's national treasurer. John Dalton, who has held that position, will return to a position in the Commerce Department, they said.

The Kennedy campaign announced yesterday that former senator Dick Clark, who resigned last week as the Carter administration's special ambassador for refugee programs, would be the national director for political organizations of the Kennedy organization.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

November 20, 1979

OPEN COMMISSION MEETING[*]

In the Matter of:

Title: Complaint of the Carter-Mondale Committee
Against the ABC, CBS, and NBC
Television Networks.

Summary: The Commission has before it a complaint of the Carter-Mondale Committee against the ABC, CBS, and NBC Television Networks concerning the networks' refusal to sell a half-hour time segment. The Committee alleges that the networks' refusal to sell the time constitutes a violation of the "reasonable access" provision of Section 312(a)(7). All of the networks claim that their decisions are reasonable and that the complaint should be denied. The Commission must decide whether the networks have fulfilled their obligations under Section 312(a)(7).

The above-entitled matter came on for subject pursuant to notice, before Chairman Charles D. Ferris presiding, at 1919 M Street, N.W., Room 856, Washington, D.C. at 2:00 p.m.

[* This transcript was included in the Appendix filed in this case in the court of appeals. Counsel for Respondents Federal Communications Commission and United States of America have consented to its inclusion in this Joint Appendix, without prejudice to the Commission's general position, which it has taken in other cases, that the comments of Commissioners at open Commission meetings are not a part of the administrative record.]

APPEARANCES:

Commissioner Tyrone Brown
Commissioner Abbott M. Washburn
Commissioner Robert E. Lee
Commissioner James H. Quello
Commissioner Joseph Fogarty
Commissioner Anne P. Jones

Also Present:

Lisa Margolis
Dick Shiben
Robert Bruce

PROCEEDINGS

(2:04 p.m.)

CHAIRMAN FERRIS: The meeting will come to order. The housekeeping announcements from the standpoint of schedule, general item number one has been passed at the request of Commissioner Washburn to December 4th. Private Radio number five has been passed by the General Counsel to December 19th. Oral number one was withdrawn at the request of the Broadcast Bureau. Television one and two are withdrawn by request of the Broadcast Bureau.

Broadcast Three was passed by Commissioner Washburn to November 29th, and the closed general one was passed by the Executive Director to December 4th. Today's meeting will begin with Complaints and Compliance Number Four, the Carter-Mondale Presidential Committee Complaint. Otherwise, after the disposition of that item, we will follow the agenda previously released. So, Dick, the first item is the complaint of the Carter-Mondale Committee against ABC, CBS, and the NBC networks.

MR. SHIBEN: Lisa Margolis has been handling this for the Bureau, and she will present the item for us.

CHAIRMAN FERRIS: Ms. Margolis?

MS. MARGOLIS: The Commission has before it a complaint filed by the Carter-Mondale Presidential Committee, Inc., against the ABC, CBS, and NBC Television Networks. The complaint allges that all three networks violated the "reasonable access" provision by refusing to sell the Committee a half hour of program time during the first week in December.

The complaint further alleges that the time is to be used by the President in his capacity as a candidate for the Democratic nomination for President. The Committee asserts that it can establish that the President is a—will be a legally qualified candidate at the time of the broadcast, and that in any event, whether he is a legally qualified candidate is not in issue because none of the networks have raised claim to the contrary.

The Committee contends that all of the networks—that the reasons given by the networks for refusing to sell the time are totally insufficient. NBC has not made any commitment to sell any time. ABC has stated that it will beging to sell time in the first week of January, 1980, and CBS has offered to sell two five-minute segments to the Committee.

Responses were requested of the networks. All of the networks assert that they have not abused their discretion and that the complaint should be denied. They argue that their decisions are reasonable since the sale of the time—since sales to Presidential candidates at this time would be premature. They further assert that their decisions are reasonable in light of the fact that a multiplicity-of-candidates problem exists at the present time.

They also claim that the sale of the requested time would result in substantial programming disruption. The "reasonable access" provision essentially requires broadcaster to provide reasonable access to Federal candidates.

The Commission, in July 1978, issued a report and order on its policy in enforcing Section 312(a)(7). There it stated that it would continue to rely on the good faith judgements of licensees in determining whether reasonable—whether—in reviewing "reasonable access cases." It further stated that it would look to three factors in determining whether reasonable access had been afforded:

It stated that it would look to—those factors were, first, the needs of candidate; second, whether a multiplicity of candidates problem existed; and, third, the availability of particular periods of time.

The Commission stressed the importance that broadcasters must give to the needs of the candidate in making "reasonable access" determination. It stated that the needs of the candidate must be honored to the fullest extent—rather, it stated that the desires of the candidate in pursuing his media campaign should be honored as much as possible within the reasonable limits imposed by the licensee.

Initially in this case, there are two procedural questions that must be considered: The first involves jurisdiction; that is, whether section 312(a)(7) applies to networks. NBC contends that it does not. NBC based its claim on the fact that the section refers to the use of a broadcasting station and that it contains in a section of Communications Act relating to license revocation.

The Bureau recommends that the Commission find that Section 312(a)(7) does apply to networks, because networks are the only practical method of securing national access. A ruling that Section 312(a)(7) does not apply to networks would make it considerably difficult for Presidential candidate to obtain access.

The Bureau does not believe that Congress intended such a result, and we therefore recommend that the Commission rule that Section 312(a)(7) does appy to networks.

The second procedural question in this case involves the question of whether President Carter is a legally qualified candidate within the meaning of our rules. In other context, the Commission has ruled that it will consider whether a candidate has qualified within the meaning of our rules, despite the absence of a claim to the contrary by the licensee.

In order to qualify nationwide, a candidate—under our rules, a candidate must show that he has qualified in ten states, and he must show that he has satisfied all three requirements of the definition of a legally qualified candidate.

In this case, the Committee has not provided any specific information to show that President Carter has qualified for a place on the ballot or made a substantial showing of bonified candidacy. However, we recognize that the Committee has stated that it can establish that President Carter is a legally qualified candidate—rather will be a legally qualified candidate at the time of the broadcast.

In light of this allegation, the Bureau recommends that the Commission proceed to consider the merits of this case. In the event that the President is not a legally qualified candidate at the time of the broadcast, the networks need not honor his request at that time.

Proceeding to the merits of the matter, the Commission —the merits, of course, involve the "reasonable access" provision which I have previously discussed. This is, in fact, a case of first impression: Although the Commission has been presented with numerous cases involving House and Senate races, it has never been presented of when reasonable access should begin Presidential races.

Accordingly, the Commission has three options available to it in this case: First, it could find that all three networks were reasonable in denying the request in light of the fact that campaigns are now being waged on a state-by-state basis and the national campaign has not yet begun.

The second option is to find that NBc and ABC were unreasonable in denying the request in light of the fact that they have not given sufficient consideration to candidate needs, while finding that CBC was reasonable in offering two five-minute segments in light of the fact that there is a multiplicity-of-candidates problem in this case.

The third option available to the Commission is to find that all three networks were unreasonable in denying the request in light of the fact that none of them have given sufficient consideration to the candidate's needs in this case.

The Bureau recommends that the Commission follow the third option and find that all three networks were unreasonable in denying the request in light of the fact that they have not given sufficient consideration to the candidate's needs.

Thus, we recommend that the Commission find that the networks were unreasonable in view of the fact that they have not given adequate explanation to support their decision. This recommendation is based on two reasons: First, the Bureau believes that the campaigns now are not being waged on an isolated, local basis; rather, we believe that the campaign is now being waged on a nationwide basis and that it is in full swing.

Second, we believe that none of the networks have given sufficient consideration to the candidates' desires in reaching their decision. Accordingly, we recommend the Commission find that all three networks were unreasonable in denying the request, and we further recommend that the Commission require the networks to advise it how they plan to comply with their "reasonable access" obligations by November 26th, 1979.

CHAIRMAN FERRIS: The option that the Bureau is recommending then, Ms. Margolis, is that all three networks are unresonable because they made a blanket determination without listening to the individual char-

acterizations of the campaign or the needs of any of the candidates, and the applicant in this case, and made a blanket determination that no time would be made available on their network until some time when they had selected in the future.

MS. MARGOLIS: Well, that is the gist of it. However, we do recognize that CBS has offered to make two five-minute segments available to President ——

CHAIRMAN FERRIS: Did it not make a determination that nothing more than a five-minute segment would be reasonable at this time?

MS. MARGOLIS: Excuse me, could you repeat that?

CHAIRMAN FERRIS: Did CBS not make a determination that anything other than five minutes would not be offered at this time?

MS. MARGOLIS: Yes.

CHAIRMAN FERRIS: Without listening to the——

MS. MARGOLIS: Yes, they did. They did not give sufficient —— yes.

CHAIRMAN FERRIS: —characteristics of the candidate from the standpoint of what message they had to convey and the need for that candidate in conducting the campaign?

MS. MARGOLIS: Exactly. In fact, the Committee stated that the purpose of the program was to kick off the entire campaign, and they had wanted to give a detailed and thoughtful picture of the Administration's record, and they felt that that could not be done in the five minutes.

CHAIRMAN FERRIS: And the networks didn't even listen to the specifics of that request. They just made a determination that that would not even be considered on the merits that they had a rule to the contrary.

MS. MARGOLIS: Exactly.

CHAIRMAN FERRIS: And that is what you are recommending is unreasonable, the fact that there was no consideration by the networks for the specific needs

of the candidate, and the policy of the Commission, previously determined, is that there are needs other than the network or the broadcaster's needs; there are needs for candidates in conducting their campaign and determining the strategy of their campaign. There is also the need of the public in being informed about probably the most significant issues that are going to come before on the networks over this next year.

So those three have to be balanced, and there can be no prejudgement from the standpoint of making time available from the standpoint of arbitrary rules with respect to the length of time or the timing. They have to—the networks and the broadcasters have to listen to the specifics of each request. Is that implicit?

MS. MARGOLIS: Exactly, yes. We also believe that the reasons that the networks did in fact give for their decisions were deficient. They had cited—in essence, all of them cited the same three reasons for their decisions. Those were timing, multiplicity of the candidates, and programming disruptions. As to timing, basically they argued that campaigns now are being waged on a local, state-by-state basis, and that the nationwide campaign is not yet in full swing.

We recognize that many announcements have been made and the coverage that has been given to the campaigns by print media, and it seems to us that campaign is indeed in full swing.

We also recognize that the primaries, in effect, determine the outcome of the conventions, in view of the fact that the delegates are bound to vote for the prevailing candidates. For that reason, we feel that the timing—that a conclusion that it is too early to begin selling time is unreasonable.

As to the multiplicity of candidates argument, we believe that networks are in the weakest position to make this argument, since they have only one group of candidates to serve, that is, Presidential candidates.

Furthermore, we believe that although the networks assert that 122 candidates have filed with the FCC, we believe it is highly unlikely that all of these candidates would be able to afford network time, and, therefore, we believe that the multiplicity of the candidates problem itself would not warrant a refusal of the requested time.

Finally, the programming disruptions argument we also felt—the Commission has only discussed programming disruptions in another context: That involved the closing—there, the Commission was discussing the closing days of the campaign, requests made on the closing days of a campaign. Here the request was made far in advance of the closing days of the campaing, and it was also made several months—I believe at least a month before the air date. For that reason we believe that the networks were unreasonable in concluding that the likelihood of substantial programming disruptions was so significant that it would warrant their refusing to sell the time.

COMMISSIONER QUELLO: ABC agreed to sell time after January 1.

MS. MARGOLIS: January 1.

COMMISSIONER QUELLO: January 1st.

MS. MARGOLIS: Beginning with the first week in January, 1980.

COMMISSIONER QUELLO: What kind of a time would require, assuming we said they should sell time. Are we going to give the networks 30 days to comply with this? Is there any timeframe?

MR. MORENO: November 26th is what we propose they file an answer.

COMMISSIONER QUELLO: November 26th.

MR. MORENO: How they intend to comply is what we have written here.

COMMISSIONER QUELLO: I will get my position over real early, and that is, as you know, I think Sec-

tion 312(a)(70, I question its Constitutionality. I think it offends the First Amendment. However, it is there, and I think it is our job to enforce it. There are 26 primaries now instead of 17 that we had before, and I hate to say the networks are unreasonable; I think maybe they had good reasons for opposing it, but in this case with the primaries increasing in number and with the difference between one network, what we are talking about is almost just 30 days difference. I disagree with the conclusions of the networks, and I think we ought to go ahead with the time.

It is an unusual situation, and, Mr. Chairman, I think we have to face the fact that we might be faced with a public outcry if all of a sudden we have 11 or 12 candidates all wanting the same time, but I guess that is a risk we have to take as long as Section 312(a)(7) requires reasonable access, and "reasonable" has never been defined. It is a very close call for me, but I think I will go along with it.

CHAIRMAN FERRIS: I think the question of the public outcry, I think that is exactly what the various candidates would take into consideration when they request the time. If they felt—I am sure no candidate would want to go on the air to lose ground. I am sure that that is why the candidates' considerations, you know, have to play at least a role equal to the economic interests of the networks, because this provision, 312(a)(7), says that the candidates in this timeframe are going to have to pay comparable rates. So what they are going to pay—you are going to have to sit down and negotiate the pay for this time. So from the standpoint, you know, of what the networks are losing, the standpoint of the economic interest, I would be very interested to see what that is.

COMMISSIONER QUELLO: I am not worried about economic interest on this. The fact is, if I were an adviser to a candidate, I would be very careful to as-

sess how much alienation he is going to suffer if there are too many requests with programs—interrupting programs that are very popular and viewed by millions of people.

Network income is not, certainly, any of our concern, I don't think.

CHAIRMAN FERRIS: Well, that is why I think we are here and not running campaigns, too. I think that is why we should let campaign managers run the campaigns, and we should give some deference to those judgments that are made by those who are responsible for the conduct of campaigns. The fact that in this case here, the networks, you know, had blanket rules which really stonewall these requests by not only the Carter-Mondale campaign, but other candidates in the Republican Party, demonstrate that they just had a meat-axe approach that their wishes were going to determine. They were going to determine when campaigns would start, when the public should start focusing on the most important issues to be decided in the next year, and they were going to arbitrarily pick dates.

I think that is really the issue here, and I think that is the recommendation of the Bureau that all three networks were unreasonable in their posture towards this specific request.

COMMISSIONER QUELLO: My characterization isn't nearly as harsh as yours, but I am coming out in the same way you are. I agree.

CHAIRMAN FERRIS: I am not expressing my true feelings in the fervor that I think I could.

COMMISSIONER QUELLO: Okay. Neither am I.

(Laughter)

CHAIRMAN FERRIS: I understand.

COMMISSIONER LEE: I agree that this is a close case. I guess it becomes a matter of judgment as to

whether or not you think the networks were reasonable. I think that they were reasonable, and I don't think we should run political campaigns. I don't think we should run networks either.

I think that one of the important questions to me is how a possible candidate can qualify for access before he is a candidate. It is novel, I am sure, but at the time of this decision, the Carter-Mondale ticket is not a candidate.

MR. MORENO: The other alternative, Commissioner, would be to wait a few days for him to qualify, and then we would have to rush into the same opinion anyway, assuming the same facts were there, and we might as well be criticized from the other side as saying, "Well, why did we act at that time," also. There is that other side of the argument.

COMMISSIONER LEE: Well, you are anticipating facts.

MR. MORENO: Well, we have given them the out, if they don't manage to make it anyway. We say "Well, then you are out altogether. You have got to qualify."

CHAIRMAN FERRIS: The question is, there wasn't a presentment of evidence to demonstrate political activity in ten states to demonstrate a bonified qualification. I am not saying the evidence wasn't available. It was never really put—joined in issue directly, and unless it is joined in issue directly by one of the networks, there will be no necessity for that. It hasn't been, but it is not the fact that the case couldn't be made now; it is the fact that there was no specific joining of issue on a demand presentment of that type of evidence.

COMMISSIONER BROWN: Is the requirement of qualification in ten states separate and apart from the qualification of a substantial showing of candidacy?

MR. MORENO: No, sir. It is an either/or situation: The candidate can either qualify for the ballot in ten states or make substantial showing in ten states.

COMMISSIONER BROWN: And is there—I can't believe that there is anybody in this room who would doubt that as of that date, if not as of this date, that there has been a substantial showing of candidacy on the part of the Carter-Mondale ticket.

MR. MORENO: That is what they maintain, that there will be that showing.

COMMISSIONER JONES: I don't find that I have to get to that issue, really. I am in almost the same posture, perhaps, as Commissioner Lee, but I would phrase it slightly differently, and maybe it is a real difference: I would say—I would not necessarily say that the networks have been reasonable, but I would say that I can not find that they have been unreasonable, and since I think that we sit sort of a reviewing court, my posture is that unless I could say that they are unreasonable, I don't want to second guess the judgement. So I would vote against the item.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Commissioner Fogarty? Oh, go ahead.

COMMISSIONER WASHBURN: Just following up on that, what we are talking about here really is a one-month delay in the selling of political campaign time. The Committee has asked for prime time period, early December, and ABC has offered that time in early January. So it is really a question of whether the FCC should require the networks to accede to the December timing under that section 312(a)(7) the "reasonable access" statute. It comes down to what is reasonable, and it is a close call. I agree with Commissioner Lee. But in my judgement, the January offer is not unreasonable. I believe if you polled the American public today they would say that this was, quotes, "reasonable access."

They would say that eight months of political advertising during the pre-convention period is plenty, and the Democratic Convention is August 10th, realizing that during the post-convention time they are going to get another heavy dose of political advertising.

From January through the election in November is a long, political season. It is longer than almost any other country. In most households, the month of December is given over in large part to the holidays. If the networks are required to sell political advertising to one Presidential candidate in December, they have to do so for all Presidential candidates, regardless of party. So while they might not all be able to buy the time, you could end up with a plethora of these paid, political, Presidential times going on the air in December.

So I think it is reasonable to start this off in January rather than a month early, and since the President is the Incumbent and can command more free time than any other candidate, he is less disadvantaged by the one-month delay than any of the other candidates.

Also, there is the question of the precedent. This has never come before us before in this form, and if we establish a precedent here that the candidate's own determination of his needs are overriding, then every candidate could command time at whatever moment he announces his intention to run. John Connelly announced in January of 1979. George Bush and Robert Dole announced in May of this year, John Anderson in June. I think any of them could make a good case that the campaign was in full swing in the summer.

So this is something that we may be doing here that will affect the future, and, as has been said here before, there is the First Amendment problem, and this is probably the most troublesome thing of all to me, the legal problem involved in our requiring the networks to sell the time in December, the question of FCC's interfering with the discretion of the broadcasters and substitut-

ing our judgement for theirs. I think we should stay away from doing this unless the question of unreasonableness is absolutely clearcut, and as Commissioner Jones says, it is far from clearcut that they have been unreasonable in offering this time.

So I do not find that the one-month's delay is unreasonable, and, therefore I am unable to support the item.

COMMISSIONER QUELLO: I don't find the one-month delay unreasonable, but there is this matter, and that is, legally qualified candidates are entitled, under the statute, to reasonable access, and President Carter made it clear that he would have his formal announcement or he would be a legally qualified candidate before the broadcast. So we have to consider that, too.

MR. BRUCE: Mr. Chairman, our office has worked very closely with the Broadcast Bureau in reviewing the order, and I think we basically concur in the result. I would just like to clarify what I think the decision holds, because I don't think we are finding that in the balancing process between licensee discretion and candidates' needs that candidates' needs are necessarily predominate. What we found here—what we did was—what this order does is approach each of the network's response, and we have looked at the reasonableness of the response.

What we found is that each of those responses ignores one of the relevant factors that we delineated in July of 1978: In 1978 we said there are three or four factors to be weighed, one of which was the candidates' own views as to how he could conduct his media campaign, and not one of the responses addresses that concern.

So, in a sense, our ruling is a very narrow one. It doesn't necessarily portend a rebalancing of those factors. What it finds is on the facts before us that the networks, in effect, fail to address one of the relevant factors, and we do sit, not—I think this order is very carefully drawn to avoid the Commission being in a position of second guessing a judgement made by a licensee.

I think we are looking at it from the standpoint of whether a relevant factor was ignored, and I think we are also looking in terms of the network that did offer some time, whether or not the response of time—whether the offer of a five-minute time in the context of the particular request that was made was responsive, and I think the order finds that there wasn't any attempt by the networks to address the particular reasons that the candidate gave to provide the time.

So I don't think that this order involes a rebalancing of factors. It certainly brings into focus the failure of the networks in this case to give any weight at all in their responses in this particular case to the candidates' needs.

So I would modify, I think, Commissioner Washburn's characterization of the holding case in that regard. I think we come down to the same result which is the decision of the three networks were, in our view, unreasonable.

COMMISSIONER LEE: I would like to—

COMMISSIONER BROWN: Go ahead, Commissioner.

COMMISSIONER LEE: I just would like your response to whether or not Section 312(a)(7) which requires reasonable access applies to networks. I know what you will say, but the provision speaks of sanctions and the network—and speaks of licenses and permits. The networks, as networks, do not hold licenses or—how do you reach that?

MR. BRUCE: I think that the path to jurisdiction is not uncluttered, but I think it is fairly clear, at least I think we can find our way to that.

COMMISSIONER LEE: That is kind of a contradiction in terms.

MR. BRUCE: Yes.

COMMISSIONER LEE: I accept it only because you are a prominent lawyer.

MR. BRUCE: Well, I appreciate your deference, but I think what we have is a history of interpretation under the lowest unit charge has been applied to the networks even though the statute refers to broadcasting stations. The 315 itself does not refer to networks; it refers to broadcast stations, but the Commission over the years has construed the provision as applicable to the networks.

And I think there are a series of decisions involving the chain broadcasting rules that were reviewed in the Second Circuit in the Mansfield case in which Second Circuit accepted a fairly long-standing interpretation of the Commission that the networks fell within the definition of radio broadcasting.

So I also think that you have to read Section 312 (a) (7) as really having two elements to is, one of which adopts the revocation provision; the other adopts an obligation to provide reasonable access, and the phrase that imposes the reasonable access obligation is not limited by its terms to local broadcast stations.

COMMISSION LEE: I don't know as I can completely accept that, and I guess the only way I can get the response I would like: Suppose the network offered time on their five O & O stations? Could we then proceed against the network because they didn't offer time on the network?

MR. BRUCE: Well, I think the theory of this order is that that is not a responsive action by the networks, and that the obligation that is imposed on them is to make an offering of this program to their affiliates. This order does not require the affiliates, necessarily, to clear the program. That is a judgement that they have to make in their local communities. But the order is addressed to the network because our position is that we do have direct jurisdiction over them under Section 312 (a) (7) and they would have the obligation of at least make the offering to their affiliates.

COMMISSIONER LEE: I don't think the networks would accept that. I know that historically we have asked the networks to do many things, and they have always complied because they know there is a way around it through the O & O's, and that is one reason why some of us thought perhaps we should regulate the networks directly as far as we already do indirectly through the O & O's.

MR. SHIBEN: Commissioner, we have pointed out that we recognize that networks traditionally have sold time as a unit on behalf of their licensees to Presidential candidates, and it follows just flowing from that, in view of the fact they hold themselves out as a network unit, that they really can't be heard to complain that 312 (a) (7) does not apply to them.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER FOGARTY: May I pursue the jurisdictional question? I personally believe that the Commission probably could take judicial notice of the fact that the campaign is already well underway and also that President Carter and Vice President Mondale intend to run for reelection. But I do have a problem, and I would like to explore it with the General Counsel with respect to the standing of the Committee, Carter-Mondale Committee, before the Commission at this time:

The theory of this order is that the ruling is based on the assumption that Carter-Mondale—that they will be qualified candidates at the time of the broadcast. However, it seems to me—now, that is an assumption. It seems to me that 312(a) (7) requires the candidate to be qualified before he has standing to request time, and I wonder how you explain that apparent contradiction?

MR. BRUCE: Well, I think it is clear here that we have, on the complaint before us and the response to it, a real controversy between the networks and the candidate. The candidate has made a representation that by the time he intends to use the time he will be a legally

qualified candidate, and that contention is basically undisputed.

I think we have a kind of controversy of importance that this Commission has some responsibility under the circumstances to resolve. I think it would be—to find that we can not reach complaints until we have, in all circumstances, until we have a fully qualified candidate would mean that in fact 312(a)(7) rights might not be fully enforceable until some period after an announcement or after qualification. I am not sure that Congress intended to so limit the Commission's jurisdiction under Section 312(a)(7).

That is not to say, I think, that a network could not raise, as one of the factors for declining to offer time, uncertainty about the qualifications of a candidate. If a relatively unknown candidate came to the networks and made a representation that he by a certain date would be qualified in ten states, I think the network could use its uncertainty about whether or not that qualification would occur as a factor in deciding whether to make an offer at that time.

But we don't have that case here because the three networks really have not attempted, I think for fairly obvious reasons, to raise any question about the qualifications of the particular complainant here to be a legally qualified candidate.

I am concerned that simply to find a barrier presented by the procedural problem would limit the Commission's ability to adjudicate complaints, especially when potentially there might be a reasonable claim for access after an announcement, and I think the problem is that 312(a)(7) does tie us into procedures that provide for, as in this case, the filing of a complaint and response time. It does take the Commission some time to resolve those controversies, and if we take the position that we can not adjudicate those controversies until qualifications are assured, I think it means in effect that

candidates have no rights under Section 312 (a) (7) for a period of perhaps 30 to 45 days after announcement. It could be that result.

And I don't think it is necessary for the Commission to take the position that we can't resolve the complaint. I think in this case there are some very overriding interests in providing some sort of a statement of the Commission's views on reasonable access issues, and I think it is clear in this case that there is an interest in this controversy that goes beyond the interests of the particular complainant, and it is obvious that candidates from other parties have an interest in the outcome here.

I personally do not see this issue as a partisan one in any respect. It seems to me that there has been, in the discussion of this case, a clear interest across the range in how the Commission is going to apply 312(a) (7) in this election campaign.

COMMISSIONER FOGARTY: So it would be your position that it would be ridiculous, I guess, for the Commission to find any of the major candidates, Reagan, Connelly, or Carter, or Mondale, unqualified, to seek relief under 312(a) (7).

MR. BRUCE: It would seem to me that if we had, you know, a similar case come before us in which the networks did not raise any issue about the qualification of the candidate at the time the request was made, that the Commission should not shy away from resolving the controversy. I think there is an important role for the Commission acting in this area. This is a very difficult statute, and it seems to me that one result of this ruling will be to provide some sort of general tone and direction with respect to the dealings between candidates and the networks. It is a very difficult area for the Commission to deal with on a complaint basis.

COMMISSIONER LEE: It goes,—I assume it will go to court either way, so we will find out.

MR. BRUCE: We are expecting that.

COMMISSIONER LEE: There is a little minor, relatively minor point: We have generally sought specificity, and here the complaint is against the three networks. Carter-Mondale didn't want time on all three, did he?

MS. MARGOLIS: No, no.

MR. SHIBEN: He requested time on all three, and under the assumption that he would get time on at least one.

COMMISSIONER BROWN: But there are indications in the record that in fact they were only seeking time on one.

MR. SHIBEN: But he was turned down by all three.

COMMISSIONER LEE: They would have settled for one.

MR. SHIBEN: If one network was offering—

COMMISSIONER LEE: One offered them five minutes, didn't they?

MS. MARGOLIS: BCS offered two five-minute segments.

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes.

COMMISSIONER BROWN: I agree with Commissioner Lee and I think with Commissioner JOnes. This for me is a very, very close case, particularly with respect to ABC which did make an offer of an indefinite amount of time in January, and also to a lesser extent to CBS which offered some time in December. I don't like at all—I don't think any of us do, being in the position of second-guessing the network, and also, in some cases, second-guessing the candidates and their judgements about what time they need over the air; but the fact of the matter is that Congress in the statute gave us that role. We are the ones who have the obligation to decide whether or not the response of the broadcaster or here the licensee was not unreasonable, and I agree with

Commissioner Jones that that is the proper characterization.

On the facts, it seems to me that we follow the Bureau's recommendations. There were two significant decisions that we are making. I don't consider the question of whether or not the networks were intended to be covered by 312(a)(7) to be a significant issue, given the state of the law and the Commission's treatment of the networks in this area in the past.

The two significant decisions that we are making are, one, under the facts of this case, given the facts of this particular campaign, December of 1979 is not too early for the 312(a)(7) "reasonable access" requirements to attach to broadcasters generally; and, secondly, that the response of CBS, given the facts of this case, with an offer of two five-minute segments on a particular day, one of the days requested by Carter-Mondale was unreasonable.

Those are the two concrete, factual things that we are deciding here, and the Commission's analysis, and I believe that analysis is set forth in the order, is that the ABC response with time in January was unreasonable, given the fact that Carter-Mondale indicated that they wished time close to the announcement of the candidacy for a full discussion of the issues that would be involved in the campaign for a full statement setting the tone of the official campaign at or about the time of the official announcement of the campaign.

I don't think—at least my feeling is that December of 1979, for this particular campaign, is not too early, and here we can make an objective judgement. There are objective indicia out there, and they are recited in the order, that in fact both the Democratic and the Republican campaigns for President are well underway today.

Having made that objective determination, then we have to attempt to balance the needs of the candidate as cited in its pleadings against the needs of the—or

the objection of the networks or the broadcasters recited in their responses.

Given the fact that the Carter-Mondale people set forth, I believe, five or six different dates during the month of December for making this request, I come down deciding that ABC's response of "No, you can't have that time in December; you can have it in January" was not a reasonable response, was an unreasonable response to the candidate's request.

Also, given the fact of the nature of the statement that Carter-Mondale indicated they desired to make, I also conclude that CBS's response of "No, you can't have a substantial block of program time; you must limit yourself to two five-minute segments on a given day," was not responsive to the candidate's needs.

And in the case of both ABC and CBS, not to mention NBC, there were, as I read the record, no indications of countervailing considerations that were sufficiently strong or nearly strong enough to outweigh the candidate's needs in this particular case.

Now, to put a gloss on the decision, again from my perspective, I recognize that each and every one of these cases does get us involved on the periphery of First Amendment concerns, and that if the Commission is going to make the statute work, it has got to make it work within the confines of giving, permitting as much discretion to broadcaster editorial judgements as we possibly can, and that I intend to do.

On the other side of it, I think after the adoption of 312(a)(7), broadcasters have to recognize that it is no longer their role to decide when a political campaign starts for purposes of political advertising. In fact, it appears in this case that the networks decided the campaign has started for purposes of news coverage, but not for purposes of political advertisement. There was mentioned that the decision that the Bureau is recommending the Commission reach today may have the effect of—

may result in—a large number of requests for large blocks of program time for announcements in December or at some other point.

My approach to that is to decide each of these cases as they come before us. That is what the broadcaster is going to have to do.

I can certainly conceive of situations in which multiple requests by candidates, whether Presidential or local, not covered by 312 (a) (7) but covered by the Public Interest Standard, would have a great disruptive impact on broadcasters trying to meet their other obligations or simply trying to make a dollar with their programming.

And I can conceive of situations where I would be impelled by concerns about disruption to say that the broadcaster was not unreasonable in responding. But that is not the case before us now, and when the case—when that case—does reach us, if ever, we can decide it on the facts that exist then.

So I am going to vote in favor of the item.

COMMISSIONER WASHBURN: But would you entertain a question, Mr. Brown, on that?

COMMISSIONER BROWN: Sure.

COMMISSIONER WASHBURN: In September when Senator Pressler announced his candidacy, there were five announced Republican candidates in the race. Supposing he had been denied time when he announced in September? Would you say that that was a reasonable or unreasonable action by the—

COMMISSIONER BROWN: I would decide—I would try to decide—that case in the light of all the facts and circumstances that Senator Pressler presented to the Commission. I am not aware that he did present any facts or circumstances to the Commission. He—I think—I am going to yield in a moment, but I want to give you a full answer.

I think it is very important that we not decide these cases or not react to the case that happens to be before us, which has been fully briefed, by asking questions

about some other case that might come before us or might have come before us, that hasn't been fully briefed.

In a way I guess I feel it is somewhat said that we have got to make a determination over whether something was reasonable or unreasonable, because unreasonable people are somehow not quite all there. And that is not at all the kind of determination that we are trying to make. The determination that it seems to me we are forced to make in this case is a very near run thing. And—well, we ultimately have to make a determination about whether or not a broadcaster's position was reasonable or unreasonable. It is like shading in the facts are going to of necessity affect that ultimate determination.

COMMISSIONER WASHBURN: You say the broadcasters will no longer have the choice of when the campaign starts. Who does then have the choice?

COMMISSIONER BROWN: I was once a broadcaster. No, I wasn't. I was once a general counsel to a broadcast operation, Commissioner Washburn, and we went through two or three political campaigns while I was there. And at some point, as we approached the campaign season, someone would walk into my office and say, "Ty, has the campaign period started yet? Do we have to start giving equal opportunities and all that kind of stuff?" And my response for a while would be, "No, it hasn't started yet." Or "It is too early. It is just too early." You know, we are not going to block up the air waves with this political campaign stuff this early.

CHAIRMAN FERRIS: Would you quote some Latin phrase, which lawyers usually rely upon when they don't have a good reason.

(Laughter)

COMMISSIONER BROWN: We didn't learn Latin phrases in the ghetto.

(Laughter)

COMMISSIONER BROWN: What we have got to do is look for the objective, the objective—

COMMISSIONER WASHBURN: Well, as I read you then, the decision would be made case by case as they came up?

COMMISSIONER BROWN: That is right, and it is also important to recognize—

COMMISSIONER WASHBURN: And there would be no precedent set by what we do today, if we do anything today?

COMMISSIONER BROWN: The precedential value of cases such as this it seems to me is—is very minimal—because they do turn on their particular facts.

I think it is also important for the candidate to recognize that we are not here saying today if we adopt the Bureau's item that an individual candidate gets to decide when the reasonable access rights or privileges attach. That item looks toward objective indicia that the campaign is underway.

So the announcement, for example, by Senator Pressler, or Jimmy Carter back in 19— the guy was running for President four years before the election. That doesn't necessarily objectively determine that the campaign is underway.

That is what, if the broadcaster and the candidate force us to do it, that is what we have got to ultimately decide on the basis of objective indicia.

COMMISSIONER WASHBURN: But this item gives overriding importance to the candidate's own decision when his needs require this time.

COMMISSIONER BROWN: It doesn't—it doesn't in my judgment.

COMMISSIONER WASHBURN: So it has got to rub off on other candidates, even though you say it is going to be on a case by case basis.

CHAIRMAN FERRIS: I certainly hope it does rub off on other candidates. I think what we are doing here, if we adopt this order, is we are saying that a candidate does have some control over making the determination

when he or she is running for a political office, not just some media licensee making a judgment.

COMMISSIONER WASHBURN: Some control, yes. But John Connally in July of '79, supposing he said, "The campaign has started for me. I want the time."

CHAIRMAN FERRIS: Well, I think that in a situation like that I think we could apply the same criteria we have here from the standpoint of being a candidate for that office, being a bona fide candidate for that office, and requiring any requests to the networks to be treated on an ad hoc basis, not on the basis of some predetermined judgment as some arbitrary date selected unilaterally by them will apply to every candidate for every office. And that is the characterization of the events that we have here.

And I think that it would certainly apply. Now how one makes a value judgment between that candidate, that effort, that particular campaign they are involved in, and the consideration, good faith consideration, by the network of that specific request should all be factors that should be considered by us.

I think—I want to address one point that Commissioner Brown made that when you talked about us second guessing the editorial judgment of the networks and their determination. I don't think any of this is editorial judgment. I think it is economic judgment. It is not the editorial side of the networks that are making these judgments.

Matter of fact, it was very interesting to me that one network actually pledged that if there was some characterization of 312(a)(7) that required some form of consideration as it is reflected here, it would inhibit to a great extent their coverage in their news department of the political activities that are taking place. That to me is a very interesting analysis of that entity, separation of the journalistic function from its economic interests, because I, you know—the very fact that the judgments

that would be made with respect to the coverage and non-coverage of news would be orchestrated in any way by their economic self-interest with respect to whether they sell time or not, to me is not the type of expectation I have of the journalistic activities of networks.

It surprised me that that was actually even alluded to by one of the networks.

COMMISSIONER BROWN: I don't attach something holy to the word "editorial." All I meant to indicate by the use of the word "editorial" was that it is a judgment affecting the timing of programming. It is a content judgment about programming, and to that extent it is editorialized. So that most—or many—editorial judgments by many media are premised on some economic benefit that will accrue to them as a result of it.

But I think we ought to recognize that when we go into this area we are in the area affecting editorial judgment in the sense that I just described. And I don't like doing that, but that is what Congress says that we shall do in these circumstances.

I must say that I guess I like doing it a little better than leaving a situation—leaving this situation—completely, such that the networks can simply say, "Well, until April of 1979, it is too early, and we are just not going to get involved." That is the other alternative.

CHAIRMAN FERRIS: I wanted to take, if I may, just take issue with another statement of Commissioner Brown's and that is minimizing the precedential value of what the Commission does today, if it adopts the order as recommended by the Bureau.

It seems to me that we will establish a precedent for John Connoly and for Ronald Reagan and for Howard Baker and for the other major candidates. And I certainly, if I were representing their campaign committees, I would advise them to come in and site the Carter-Mondale Committee Decision if they have any trouble getting time themselves on the three networks.

COMMISSIONER QUELLO: I think this decision recognizes the campaign of 1980, so to speak, has already started, but that doesn't mean it recognizes that in December of 1984 that that campaign, '83, the next Presidential campaign will have started.

I think Commissioner Brown is right. At that time we are going to have to look at the atmosphere which surrounds us to determine whether the campaign is in full swing. And I think it is—

MR. SHIBEN: It certainly has started on the news anyway, being in full swing.

COMMISSIONER QUELLO: It is in the papers. It is on the news.

MR. SHIBEN: It is on the papers, and when it isn't pulled off by Iran.

COMMISSIONER QUELLO: In your periodicals. It is hard to pick up anything today without reading about the Presidential campaign that we are involved in.

MR. SHIBEN: I do want to say, though, I really believe that the basic judgment is programming and editorial rather than economic. I mean, I just want this record to reflect that is my opinion.

COMMISSIONER WASHBURN: Could I ask a question of the general counsel? You stressed the point, and the item stresses the point, that the networks have not given sufficient consideration to the candidates' needs.

Is there a possibility then that they could come back to us and address that subject more thoroughly and try to convince us that they have given such needs consideration? And if so, then you are—you are in for some more time.

MR. BRUCE: Well, the item doesn't foreclose that, because what we have done is we have found a response that simply fails to address a relevant factor, relevant concern.

And—and I think that all the discussion of the weight that candidates's interests get is in that context, that what—the reason that the item places such weight on it

is that in the particular case before us none of the networks really made any attempt to show that their offer of time was responsive, either to the particular request or was directed and took into account any weighing of the candidate's interests.

So I—you know, I don't think that we could anticipate what would happen in response to this ruling. We simply found on the basis of the response that has been given that the networks—all networks—were unreasonable because they were—they inadequately addressed factors they should have weighed.

And these issues—

COMMISSIONER WASHBURN: Are you saying that the could return to us then with a better description of how—

MR. BRUCE: I—

COMMISSIONER WASHBURN: That they did weight these matters?

MR. BRUCE: Our decision doesn't rule that out.

MR. BRUCE: Our decision doesn't rule that out. I think that is implicit in the decision.

CHAIRMAN FERRIS: But in that case, there would be a presentment made at that time as to what the specific factors were in making a determination then, and then be a judgment by the Commission as to whether or not those factors were within the requirements of 312(a)(7) and were reasonable.

MR. SHIBEN: I think, as Commissioner Brown said, then you would have another case before you.

COMMISSIONER QUELLO: Does that require a petition for reconsideration?

MR. BRUCE: I suppose it would. I just want to say, as just a general comment on Section 312(a)(7), the decisions that the Commission deals with here are agonizingly difficult because they involve such a very difficult balancing, and I think that we, in addressing a particular complaint, we have tried to look at it through the lens and through the perspective that the networks did, and

what we are finding, that look that they gave it was deficient, and there isn't any easy way. I am afraid that probably there will be more of these complaints, and the Commission is going to have to deal with them.

I know right after the Act was adopted, the Commission, in a primer, did strongly stress that the networks and candidates and their representatives should attempt to work out, at the beginning of the campaign, an overall approach to these issues, and I think obviously that isn't going to eliminate all complaints or all controversies.

But we are faced here with an isolated decision and decisions that are not well explained, and I think on the face of the record before us, there is no alternative, real alternative, but to find that their responses were inadequate and unreasonable.

COMMISSIONER BROWN: Does the record indicate how many minutes of prime time there are in the month of December?

CHAIRMAN FERRIS: 5,529—

COMMISSIONER BROWN: 5,600 minutes.

CHAIRMAN FERRIS: —minutes are there—

COMMISSIONER BROWN: 5,600 is what I recall.

MS. MARGOLIS: I think it is stated in the reply.

COMMISSIONER BROWN: 500 half hours.

COMMISSIONER JONES: 5,400 minutes. It is on page 20.

CHAIRMAN FERRIS: 5,400 prime time minutes.

COMMISSIONER BROWN: 5,400 minutes, and we are talking about 30 out of those 5,400 minutes, with a possibilily of some other requests. Is that right? Is that about what it is?

CHAIRMAN FERRIS: That is the order of magnitude.

COMMISSIONER QUELLO: Well, Mr. Chairman, proceed.

CHAIRMAN FERRIS: Questions? Any further discussion? The question then is on the adoption of the memorandum opinion and order, finding the three net-

works acted unreasonably in discharging the obligations imposed upon them by 312(a)(7) and instructing that the three networks advise the Commission how they intend to fulfill Section 312(a)(7) on or before November 26th, 1979. All in favor say "aye."

(There was a chorus of "ayes.")

CHAIRMAN FERRIS: Opposed, "no."

(There was a chorus of "noes.")

CHAIRMAN FERRIS: The "ayes" have it.

COMMISSIONER BROWN: Mr. Chairman, I believe you have some editorials on the item for me?

CHAIRMAN FERRIS: Yes.

COMMISSIONER QUELLO: And I will have a statement.

COMMISSIONER WASHBURN: I will have a statement.

COMMISSIONER LEE: I will have a statement.

(Pause)

CHAIRMAN FERRIS: We can finish complaints and compliance.

(Whereupon, the Commission meeting went off the record at 3:08 p.m.)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS INC. PETITION FOR STAY

CBS Inc. ("CBS") hereby petitions the Commission to stay its decision in this matter released on November 21, 1979, holding that CBS's determination not to sell one half-hour of program time to the Carter-Mondale Committee, and instead to offer two five-minute programs, was unreasonable. The Commission ordered that "each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979." Memorandum, Opinion and Order at 23.

The grounds for this petition are as follows:

1. CBS is today filing a Petition for Reconsideration of the Commission's decision, urging that the Commission reconsider its finding that CBS' offer to sell two five minute programs and not at this time to sell half-hour programs is unreasonable.

2. If reconsideration is denied, CBS will seek review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's decision.

3. The briefing, argument and decision of that review proceeding cannot possibly be concluded by Monday, November 26, 1979, the date on which the networks have been ordered to inform the Commission as to how they intend to comply with the "reasonable access" provision

in this matter. The Commission required thirteen days to decide the present controversy and an additional day to issue its decision.

4. The Carter-Mondale Committee does not seek to purchase time until the December 4-7, 1979, period, and indeed President Carter has not yet announced his candidacy for re-election.

5. We believe that that decision raises substantial questions. The constitutionality of Section 312 has never been decided, and the constitutional questions are substantial. The Commission's decision also presents substantial statutory and administrative law questions which require judicial review.

6. If reconsideration is denied and a stay is granted, CBS will undertake to immediately file a Petition for Review in the Court of Appeals; unless the Court orders otherwise, will be prepared to file its brief on the merits with the Court of Appeals within two business days after denial of its Petition for Reconsideration; and will otherwise seek to expedite the Court of Appeals proceeding.

ACCORDINGLY, CBS respectfully requests that a stay of the Commission's order be granted pending reconsideration and, if reconsideration is denied, pending judicial review.

CBS INC.
by

/s/ Ralph E. Goldberg
RALPH E. GOLDBERG
51 W. 52nd Street
New York, New York 10019

/s/ Joseph DeFranco
JOSEPH DEFRANCO

/s/ Mark W. Johnson
MARK W. JOHNSON
1800 M Street, N.W.
Washington, D.C. 20036

Its Attorneys

Of Counsel:

Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

November 21, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS INC. PETITION FOR RECONSIDERATION

CBS Inc. ("CBS") hereby petitions for reconsideration of the Commission's order in this matter released on November 21, 1979, holding that CBS's determination not to sell one half-hour of program time to the Carter-Mondale Committee, and instead to offer two five-minute programs, was unreasonable. The Commission ordered that "each network is instructed to advise the Commission as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979." Memorandum, Report and Order at 23.

At the outset, we believe it is important to make clear our belief that the decision of CBS not to sell at this time a half-hour of prime time to the Carter-Mondale Presidential Committee was an editorial decision, no different from the decisions, upheld by the Supreme Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS* v. *DNC"*), not to sell time for editorial advertising. We believe that the Commission in overriding that editorial decision violated the First Amendment and the Communications Act, and that it acted arbitrarily and capriciously.

The decision of the Commission finding CBS' judgment to be unreasonable does violence to the statutory purpose. The legislative history of Section 312 clearly

shows that no drastic change from Commission requirements was intended, and that the legislation was designed to do no more than to codify existing practice. *CBS* v. *DNC*, 412 U.S. at 113-14 n.12. We also note that the legislative history of Section 312 strongly suggests a Congressional purpose to shorten, not extend, the length of political campaigns. *See S. Rep.* 92-96, 92d Cong., 1st Sess. (1971); *see also* 47 U.S.C. § 315(b) (1976) (limiting most favorable media charges to 45 or 60-day periods before elections). CBS practice during the past decade has been to decline to sell time in half-hour segments this early in Presidential primary campaigns. The Commission's disregard of licensee judgments and the substitution of candidate judgments * in this sensitive area is particularly inappropriate in view of the political considerations involved when the President himself seeks access to the media. See *Democratic National Committee* v. *FCC*, 460 F.2d 891 (D.C. Cir. 1972). Further, the Commission's decision fails to adequately explain its departure from its own prior precedent in which it affirmed a licensee's rejection of a request for a 30-minute prime time, as opposed to 5-minute program. *Letter to Paul A. Talmey*, 31 R.R.2d 1039 (1974). Under the circumstances we believe that the Commission should grant reconsideration, and deny the Carter-Mondale Committee's complaint.

In this Petition for Reconsideration we will not reiterate the arguments set forth in our original comments. We do wish to make clear that we believe that the Commission is without jurisdiction to require that the networks sell time for political programs under Section 312 ** and that we believe that Section 312(a)(7),

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* See Memorandum, Opinion and Order at 13.

** Section 312(a)(7) by its terms only authorizes the Commission to revoke station licenses or construction permits. At the time that Section 312(a)(7) was enacted in 1972 Congress was

particularly as interpreted by the Commission in this case, violates the First Amendment.*

We believe, however, that one significant element of the Commission's decision requires further comment,

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of course aware of the existence of networks, and, yet the plain language of the provision applies only to stations. Discussions in the Committee Reports and Congressional hearings and debates concerning Section 312 were in terms of reviewing an individual station's performance at license renewal time. So far as we are aware, there was no suggestion that Section 312 should be made applicable to networks or that networks were failing to provide federal candidates reasonable opportunities to purchase network time.

* There can be no question but that an access requirement applicable to the print media would violate the First Amendment. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The Eighth Circuit, moreover, has concluded that the First Amendment would be violated by creation of an access requirement applicable to cable television, and strongly implied that such a requirement would be unconstitutional in broadcasting. *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 99 S. Ct. 1435 (1979). We believe that nothing in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), upholding the Commission's personal attack rules, or other decisions upholding Commission adoption of the prime time access rule in any way suggests that granting access to particular speakers would be constitutional, where the licensee has not made the initial determination to present program material which triggers a reply requirement.

Indeed, as we pointed out in our original comments (p. 15), while *CBS* v. *DNC*, 402 U.S. 94 (1973), did not hold that granting rights of access to political candidates would be unconstitutional, many of the constitutional considerations discussed in the *CBS* case suggest that granting such a right of access is inconsistent with the First Amendment. Moreover, given these constitutional issues, *CBS* v. *DNC* requires at a minimum that the Commission not do what it did in this case—substitute its judgment for the good faith judgment of broadcasters on a question of editorial judgment. We note that the Commission has not decided the constitutional issues. Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 43 R.R.2d 1029, 1047 (1978); Memorandum, Opinion and Order at 15.

concerning CBS' alleged failure to consider the needs of the candidate. We believe that Section 312 was designed to apply equally to candidates similarly situated, and the desire of one particular candidate to present his views in a particular format should not affect the reasonableness of a licensee's determination that it is too early in the campaign to begin selling time, or that it is too early in the campaign to begin selling time in half-hour segments.

In any event CBS has considered the needs of the candidate. Thus:

1. CBS considered the desire of the Carter-Mondale Committee to purchase a half-hour of time, and concluded that, at this early stage in the campaign, the sale only of 5-minute segments would be reasonable. In that connection we believe it is pertinent that the only special circumstance alluded to by the Carter-Mondale Committee in seeking to purchase time was the upcoming Iowa caucus on January 21, 1980 as referred to in the October 11, 1979, letter from Mr. Rafshoon to Mr. Backe, attached to the Carter-Mondale complaint. We also note that the average audience for 5-minute political programs of major candidates in the CBS Television Network in the last decade was about 67% greater than the audience for half-hour political programs.

2. CBS considered that the first Democratic presidential primary will not occur until February 26, 1980, and that there will be thirty-five more primaries in additional states during the period March 4, 1980 to June 3, 1980. CBS also considered that during the pre-convention period, Presidential campaigns primarily focused on delegate contests in individual states.

3. CBS considered the fact that the Democratic National Convention will not convene until August 11, 1980, some nine months after the period for which the

Carter-Mondale Committee requested the right to purchase time. Similarly, the Republican convention will not convene until July 14, 1980.

4. CBS considered the importance of treating President Carter equally with his Democratic and Republican opponents in the sale of time.

5. CBS considered that President Carter had not yet announced as a candidate, and that his formal campaign will barely have begun during the period when time is sought to be purchased.

CBS did not consider, and does not believe it was appropriate to consider, the content of the particular program for which the Carter-Mondale Committee wished to purchase time, the substantive importance of the issues that the Committee intended to address; nor was CBS offered the opportunity to view the program. In this connection, it is both the Congress' and the Commission's strong policy under Section 315 that a licensee play the most limited possible role in determining the contents of candidates' appearances. *E.g., Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); Public Notice, *Use of Broadcast Facilities by Candidates For Public Office*, 24 F.C.C.2d 832, 873-76 (1970).

While we also believe that the circumstances of the individual candidate are generally not pertinent to the question of reasonable access under Section 312, if the candidate's individual circumstances are to be considered, we cannot help but note that President Carter has had substantial opportunity for the presentation of his views on the CBS Television Network. Thus, since October 1 President Carter has appeared on the CBS Television four times to present presidential addresses for nearly two hours, in addition to 52 appearances on regularly scheduled news programs. Indeed, the District of Colum-

bia Circuit has recognized that the President of the United States has unique opportunities to present his views in the broadcast medium. *Democratic National Committee* v. *FCC*, 460 F.2d 891, 905 (D.C. Cir. 1972) ("No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world.").

In addition to considering the situation surrounding the candidates for President, CBS also considered other factors which it believes make it appropriate to decline to sell the Carter-Mondale Committee a half-hour of time at this early stage of the campaign and to limit the offer to five-minute segments.

First, CBS considered that there are presently a large number of announced candidates for President; that there are already, or there is a reasonable expectation that there will be, at least three major candidates for the Democratic nomination and eleven major candidates for the Republican nomination; that other candidates have already requested the right to purchase half-hour blocks of time; that rarely if ever has CBS received so many requests to purchase half-hour time segments so early in the Presidential primary campaigns (p. 4 of CBS Comments); that the cost of a half-hour of time on the CBS Television Network ranges from $172-186,000 in prime time;* that in the 1976 primaries, 15 Presidential candidates qualified for a total of more than $24.1 million in Federal matching funds;** that many candidates can thus afford to purchase time; that in the past minor candidates for President have sought

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* The candidates will also be charged an origination fee in prime time of $1662.

** H. Alexander, Financing Politics: Money, Elections and Political Reform, 246 (CQ Press 1976).

to purchase and have purchased time on the CBS Television Network (pp. 9-10, CBS Comments). Once time is granted under Section 312 (a) (7), of course, federal law operates to compel the sale of equal time to all other qualified candidates regardless of their own special circumstances, and of their own "needs."

Second, CBS made the editorial judgment that the disruption of its program service in the prime time this far in advance of the nominating convention would unreasonably interfere with its overall service to its viewing audience. CBS also considered that its owned and affiliated stations have received and will receive many requests from local federal and state candidates to purchase program time for political advertising, which requests will be acted upon by the stations in light of all relevant local circumstances. Those requests which are granted will, of course, further interrupt other programming.

Third, CBS considered that its past practice has not been to sell half-hour segments of time this early in the primary campaigns.*

Finally, CBS considered it essential that, in applying its political sales policies, they be implemented as uniformly and fairly as possible and not only to address

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* In its original comments (pp. 7-8) CBS stated that "the CBS Television Network has not previously sold half-hour time period for Presidential candidates in the pre-convention period. . . ." See Memorandum, Opinion and Order at 23. On further review we find that this was the case in connection with the 1972 and 1976 primary elections. Prior to that, available records indicate that in the 1964 and 1968 elections several half-hour periods were sold prior to the conventions—but none before May of the applicable year.

the campaign needs of a particular candidate. It would appear clear that federal law contemplates nothing less.*

ACCORDINGLY, RECONSIDERATION SHOULD BE GRANTED.

CBS INC.
By

/s/ Ralph E. Goldberg
RALPH E. GOLDBERG
51 W. 52 Street
New York, New York 10019

/s/ Joseph DeFranco
JOSEPH DEFRANCO
1800 M Street, N.W.
Washington, D.C. 20036

/s/ Mark W. Johnson
MARK W. JOHNSON
1800 M Street, N.W.
Washington, D.C. 20036

Its Attorneys

Of Counsel:

Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

November 21, 1979

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* Since the Commission's Memorandum, Opinion and Order was not released until after 3:00 p.m. today, this Motion does not deal with all new matters mentioned therein—none of which, we believe, supports the Commission's decision.

[LETTER FROM
NATIONAL BROADCASTING COMPANY, INC.]

NBC
National Broadcasting Company, Inc.
Howard Monderer
Law Department
Vice President, Law
Washington

1800 K Street, N.W.
Washington, D.C. 20006 202-833-3600

November 23, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750

Dear Mr. Tricarico:

National Broadcasting Company, Inc. ("NBC") files this submission in response to the conclusion of the Commission that the NBC Television Network's refusal to sell to the Carter-Mondale Presidential Committee ("Committee") a one-half hour time period between 8:00 and 10:30 p.m. ET on December 4, 5, 6, or 7, 1979 * was

* As NBC pointed out in its Response, the Committee has made it clear that no other length of network time and no other dates are satisfactory to it, and it was therefore unnecessary for NBC to consider alternative arrangements. That such alternatives, clearly unacceptable to the Committee, were not offered simply cannot be considered to constitute an " 'arbitrary, blanket' ban", as the Commission suggests (Memorandum Opinion and Order relased November 21, 1979 ¶ 21). As NBC emphasized in its Response, it has no rigid policy as to the selling of time to candi-

unreasonable because "NBC has apparently given no consideration to the Committee's determination that 'the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States'; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date." Memorandum Opinion and Order, Released November 21, 1979 (the "Opinion") at ¶ 36. Elsewhere in its opinion the Commission refers back to this statement in shorthand fashion, referring to the asserted failure by NBC "to give any consideration to the needs of the candidate in reaching its decision." (¶ 46) (*and see also* ¶ 31). The Commission elsewhere notes that in these circumstances the reasons NBC has "in fact given to support its decision are 'insufficient' and in the absence of further explanation" (¶ 37) the Commission refuses to find that NBC acted reasonably.

The Commission's General Counsel stated at the Commission's meeting which considered adoption of the Opinion that a network could respond to these conclusions by reconsidering its original decision and reweighing all relevant factors, including the "needs of the candidate" as an element in that balancing; the Commission's decision, he stated, did not rule out a network's returning to the Commission with its evaluation of all the factors, perhaps in the form of a petition for reconsideration. The opinion of the Commission confirms this. Accordingly, NBC respectfully requests that the Commission consider this letter as responsive to that statement.

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dates, but evaluates each request to purchase time on a case-by-case basis. Such evaluation was made here and NBC's decision not to sell the requested time was, in light of all the applicable factors, reasonable.

NBC wishes, at the outset, to assure the Commission that it did in fact take into consideration, in its initial decision, the "needs" of candidates for the office of the Presidency in general and Mr. Carter's expressed needs and desires in specific in assessing the Committee's request. See *Report and Order, Policy in Enforcing Section 312(a)(7) of the Communications Act* ("Report and Order"), 68 FCC 2d 1079, 1090 (1978); Opinion at ¶¶ 36, 46. In fact, each of the various factors alluded to by the Committee in explaining what it believed to be the appropriateness of its request was considered. NBC considered then and has, since the Commission's decision, reconsidered the needs of a campaign for the Presidency generally and Mr. Carter's expressed "needs" and "desires[*] as to the method of conducting his . . . media

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* While, as stated above, NBC has considered the Committee's expression of need and its expressed "desires", it has not undertaken to evaluate these expressed needs and desires. NBC questions the propriety of a network being obliged to assess, at Commission direction, the validity of a candidate's expressed needs as to his campaign or whether one candidate or another was more or less in "need" of the time in light of the state of his campaign (and his standing in the race). To compel a broadcaster to engage in such assessments and subject it to governmental review as to such assessment might well violate the Constitutional rights of both the candidate and the licensee under the First and Fifth Amendments as well as those provisions of the Constitution relating directly to the federal electoral process. (Were such an evaluation of need a proper factor, or course, President Carter, who as the incumbent holder of our nation's highest office has had daily television coverage, would be the candidate *least* in need of the time requested at this early date.)

Nor do we believe that any general need for time exists on the part of Presidential candidates at this date. While, to be sure, the Presidential campaign is a matter of national rather than purely local concern, it does not follow that the needs of Presidential campaigns generally with respect to such early and discrete events as the Iowa Caucus cannot be met adequately by the purchase of time on local stations.

campaign." * (Report and Order at 1089, n. 14) NBC has again, and separately, in light of the Commission's decision, weighed these considerations against other relevant factors including, as we described in our Response: the requirements of 315; the timing of the requested broadcast relative to the overall nomination campaign; the pool of available programming time; ** the number of other actual or potential candidates for nomination for the Presidency; and the extensive coverage which the NBC television network has already given to President Carter.***

In light of this weighing process we decline to grant the request made by the Committee for purchase of one

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* This factor was referred to in NBC's Response (at p. 6) and was among those originally considered by NBC.

** As part of the process by which it evaluated the request from the Committee, NBC examined the pool of available programming time and considered its adequacy in light of the Carter request and requests which might be made under Section 315 by other candidates. NBC has only 7 half-hour program periods available during the entire month of December. (NBC Response, pp. 4-5) Were NBC compelled to sell the requested time to the Committee and to make time available, as it must under Section 315, to the many other candidates who might then request it, it likely would be forced to remove scheduled hour programming. It simply does not have alternative half-hour programming readily available to fill out the remainder of the hour program periods thus vacated. This distinct scheduling problems which faces NBC in December (one which may vary from network to network and which does in fact vary for NBC from month to month) underscores the reasonableness of NBC's decision not to grant the specific request made by the Committee at this time.

*** The NBC Television Network has, of course, provided the public with extensive coverage of and information about President Carter. Since January 1, 1979, President Carter has made approximately 115 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in approximately 115 reports in each of the "NBC Nightly News" and "NBC Today" programs since the beginning of this year.

half-hour of prime time on December 4, 5, 6 or 7, 1979. Notwithstanding the Committee's expressed desire for the time, it remains true that were the NBC Television Network to sell a half hour of prime time for use by President Carter at this time, on the basis upon which the Committee claims it, there would seem to be no principled basis on which the Network could refuse to sell a similar time period during prime time to every one of the many legally qualified candidates for the Democratic and Republican Party presidential nominations who might make a similar request. This is the effect of Section 315.* The other factors described in NBC's Response as militating against a grant of the request provide additional support for NBC's decision. NBC's judgment in declining to make available the requested time was reasonable and NBC's decision therefore must be affirmed even if the Commission would not have come to the same decision on its own. See *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

The Commission must carefully consider both the statutory and constitutional limits to its ability to re-

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* Although the Commission's decision notes the unlikelihood that "all" of the candidates who have filed with the Federal Election Commission will have the "financial resources necessary to purchase a half hour of network prime time," (Opinion ¶ 42), it does not state and most certainly does not provide support for the view that a significant number of the candidates may not have such resources. The cost of a half hour of prime time on the NBC Television Network varies from $125,000-$150,000.

It should be noted, of course, that other candidates' time requests are not necessarily limited to those made under Section 315. Such candidate may obtain Section 315 time and then seek time of his own under the reasonable access requirements of Section 312(a)(7). Given the weight the Commission would seem to attach to a candidate's own "needs" and "desires", it might prove improper to decline to honor such request; the grant of such time would, of course, set in motion an entirely new round of equal time requests.

quire candidate access to broadcast stations.* (*See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973)). In this case, NBC's judgment refusing to make the requested time available was reasonable and that being so, the Commission should dismiss the complaint. See *Straus Communications, Inc.* v. *FCC, supra.*

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* It should be noted, for example, that the construction the Commission has put on the statute (§ 213(a)(7)) has the clear effect of extending by Government order the already lengthy Presidential campaign, despite the clear intent of the legislative draftsmen that the 1972 Amendments to the Communications Act *shorten* the campaign. *See, e.g.,* Sen. Rep. No. 92-96 (92nd Cong., 1st Sess.) at 28 (1971). The Commission's interpretation thus exacerbates rather than helps an already existing problem afflicting the political process; it also allows well-funded candidates (such as incumbents) to exercise their financial leverage at so early a stage as to threaten to drive out their poorer opponents even before the first primary is held. The statute and its legislative history do not suggest such an interpretation, nor do we believe the Commission's reading of Section 312(a)(7) generally is consistent with the limited scope of its draftsmen's intent. *See* Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, (92nd Cong., 1st Sess.) at 103, 118, 120 (1971) (statement of Sen. Hugh Scott and joint statement of Sen. Hugh Scott and Sen. Charles McC. Mathias).

Further, the interpretation of the statute adopted by the Commission may well annul the legislative decision that broadcasters *not* be treated as common carriers. The Commission is, of course, without authority to make such determinations.

It should be emphasized that the statute on its face and most certainly as applied by the Commission in this decision, involves so clear an intrusion into licensee discretion as to raise serious questions of its constitutionality under the First Amendment. *See CBS* v. *DNC, supra.* Indeed, in his separate statement, Commissioner Quello, whose vote was crucial in light of the 4-3 division of the Commission, explicitly recognized the First Amendment risks posed by Section 312(a)(7).

In light of the time constraints created by the Commission's November 26, 1979 deadline, NBC respectfully requests the promptest possible notice of the disposition of the matter raised in this letter.*

Respectfully submitted,

HOWARD MONDERER
Vice President, Law, Washington
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

[List of Recipients Omitted in Printing]

* By separate letter of this date NBC has sought a stay of the Commission's Opinion in the event that decision is not modified in light of this submission, as well as a stay pending consideration of this submission.

[LETTER FROM
NATIONAL BROADCASTING COMPANY, INC.]

NBC
National Broadcasting Company, Inc.
Howard Monderer
Law Department
Vice President, Law
Washington

1800 K Street, N.W.
Washington, D.C. 20006 202-833-3600

November 23, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750

Dear Mr. Tricarico:

On November 20, 1979 the Commission adopted, and on November 21, 1979 released, its Memorandum Opinion and Order (the "Order") in this matter. The Commission set November 26, 1979 as the date by which NBC was to inform the Commission of how the Network intended to comply with the Order. In light of the imminence of the November 26, 1979 date NBC requests that the Commission stay enforcement of the Order pending the Commission's consideration of a letter of this date in which NBC seeks reconsideration of the Order. NBC believes such review will convince the Commission that NBC has acted reasonably and that no further action on NBC's part is required.

It is requested, however, that in the event the Commission should continue to believe that further action is

required by NBC to comply with Section 312(a)(7) notwithstanding NBC's request for reconsideration, the Commission stay the Order or any subsequent order requiring further action on NBC's part until NBC has had an opportunity to seek judicial review. NBC represents that such judicial review would be sought on the promptest possible basis.* Such a stay is appropriate here for a number of reasons.** Thus, the Commission itself, in its initial press release, has characterized its decision here as "far-reaching" and the Carter-Mondale Committee has noted that the case presented the Commission with "important questions of statutory interpretation which [the Commission] has not yet had an opportunity to address in a specific context" (Reply of Carter-Mondale Presidential Committee, Inc. at 1).

The statutory and constitutional questions raised by this case deserve prompt appellate review—review which could be threatened by mootness if the Commission's order, backed by the powerful sanctions of Section 312, is not stayed. Were NBC required to program against its judgment, the constitutional and statutory rights it asserts would be irreparably lost. Further, given the limitations imposed on NBC's own programming schedule by the absence of any significant number of half hour program time periods during December, and the likeli-

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* NBC is prepared to file a petition for review of an adverse decision of the Commission on the next business day after receipt of that decision and to file its brief on the merits on an expedited basis as ordered by the Court.

** In Complaint of *Accuracy In Media, Inc.* FCC No. 73-1232 ("Pensions"), the Commission granted NBC a stay to permit it to seek appellate determination of its stay application. (Order of January 23, 1974) The Commission authorized that stay even though its ruling, in contrast to that here, had been unanimous, and even though (again unlike this case) the Commission was of the belief that it had merely applied established doctrine to the facts of that case.

hood that it would have to meet equal time requests from other Presidential candidates, enforcement of the Order would require significant dislocation of NBC's programming schedule without the opportunity for judicial review. These dislocations could not be undone by subsequent court decisions. Indeed, it may well be that even if the Commission decision requiring a network to sell time to the Committee were reversed after the Committee's program had been broadcast, the network would still be obliged to make time available to other candidates under Section 315. On the other hand, the Carter-Mondale Committee apparently has already prepared the film it seeks to broadcast. Thus, speedy review would permit the important questions presented to be reviewed without necessarily prohibiting compliance with the Committee's request for time during the period December 4-7, 1979, should the courts so direct.

This Commission has, by a sharply divided 4-3 vote, rendered a decision of enormous consequence for the broadcasting industry and for the political process. It has done so although at least one member of the narrow majority has explicitly recognized the serious constitutional problems posed by the statute in question. The Commission's decision will affect profoundly the conduct of this Presidential campaign—and future campaigns. Should the Commission continue to believe that further action by NBC is required to comply with Section 312 (a)(7), the Commission's Order should be stayed to permit the promptest possible judicial review of that Order.

In light of the time constraints created by the Commission's November 26, 1979 deadline NBC respectfully requests the promptest possible notice of the disposition of the matters raised in this letter.

Respectfully submitted,

HOWARD MONDERER
Vice President, Law, Washington
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D.C. 20006

[List of Recipients Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint of the
Carter-Mondale Presidential Committee, Inc.

To: The Commission

PETITION FOR RECONSIDERATION OF AMERICAN BROADCASTING COMPANIES, INC.

American Broadcasting Companies, Inc. ("ABC"), by its attorneys, hereby petitions for reconsideration of the Commission's *Memorandum Opinion and Order* (FCC 79-750) released in the above-captioned matter on November 21, 1979.* In support whereof, the following is respectfully submitted.

Preliminary Statement

The complaint in this case concerns the request of the Carter-Mondale Presidential Committee, Inc. ("Committee") to purchase one half-hour of network program time between the hours of 8:00 and 10:30 p.m. during the December 4-7, 1979 period. ABC declined to accede to the Committee's specific request for a December 4-7 date, and subsequently indicated that it would make time available during the first week of January. The Commission's *Order* holds that this decision to make time available in early January, but not in early December,

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* The Commission's *Memorandum Opinion and Order* was not released until after 3:00 p.m. on the afternoon before Thanksgiving Day. This petition is therefore filed on the first day that Commission offices are open following the one-day Thanksgiving holiday.

was unreasonable. ABC and the other commercial television networks have been "instructed to advise the Commission as to how they intend to fulfill their Section 312 (a) (7) obligations on or before November 26, 1979." *Memorandum Opinion and Order*, para. 50.

The Commission's decision establishes new law with extremely far-reaching implications. In what is admittedly a case of "first impression," * the Commission has ruled that a major, if not controlling, criterion for determining when "reasonable access" begins is the expressed needs of individual candidates. This ruling has (a) removed a substantial element of licensee discretion traditionally associated with political broadcasting matters, (b) substituted the Commission's judgment for the good faith judgment of broadcasters as to when the sale of political broadcast time must commence and (c) embarked on a course which not only contravenes the First Amendment but is also harmful to the overall public interest.**

The Commission's decision that ABC was unreasonable in affording time in January but not in December does not specify what time earlier than January would be reasonable. Under the Commission's decision, presumably time earlier than the month of January that would more nearly meet candidate "needs", but not necessarily the specific dates and times requested, would qualify as reasonable. If the decision were read to require the sale of one of the specific dates and times requested, it would come perilously close to a judgment that candidates can dictate the particular time of ap-

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* *Transcript* of November 20, 1979, open-meeting, p. 8. The entire *Transcript* is attached hereto as *Appendix A*.

** The Commission's decision, unless overturned, also makes new law by extending Section 312(a) (7) to national networks as distinguished from stations.

pearance—a position for which there is absolutely no legislative support.*

Because ABC views this decision as directly and adversely impacting fundamental principles, ABC intends to seek immediate judicial review if the Commission denies reconsideration.**

Reasons for Granting Reconsideration

A.

We believe the acknowledged "first impression" nature of the case as well as its far-reaching implications, standing alone, warrant further examination of the critical questions presented. No matter how one attempts to limit the scope of this ruling,*** its impact will be felt by all broadcasters in all future federal elections.****

B.

The Commission's decision seriously distorts the meaning and purpose of Section 312(a)(7), ***** and unduly

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* While conceding that President Carter is not presently a "legally qualified candidate" under Commission rules, the Committee in this case nevertheless suggested that all requirements of Section 73.1940 would be met at the time of President Carter's formal declaration—and indicated that it was prepared to make the required showing. In granting candidate "standing" in this case and ruling that Section 312(a)(7) rights must be afforded without requiring such a showing in advance, the Commission has acted contrary to prior practice and established a potentially troublesome precedent affecting its administration of all political broadcasting matters.

** In a separate document filed simultaneously herewith, ABC requests that the Commission's order be stayed pending reconsideration and, if reconsideration is denied, pending expeditious judicial review.

*** See *Transcript*, pp. 22-23; 36-39; 42-43.

**** See *Transcript*, pp. 20-21; 36-39.

***** Our position that the Commission has misconstrued and misapplied Section 312(a)(7) includes the view that this statu-

complicates its future application. Without support from legislative history, and contrary to the Commission's recent interpretation of this statutory provision,* the Commission has drastically lengthened media coverage of federal election campaigns based almost exclusively on individual candidate judgments. Under this ruling, there may be no practical way for broadcasters to exercise any independent judgment and meaningfully respond to the requests of federal candidates in future federal campaigns who decide to inaugurate their candidacies at a very early stage and demand access based on their own alleged individual needs.

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tory provision is solely directed to station licenses and does not extend to the unique operation of national networks providing programming to affiliated stations. The Commission's general discussion and resolution of this jurisdictional point (*Memorandum Opinion and Order*, paras. 22-27) is particularly suspect in light of both the plain language of the statutory provision and the Commission's prior acknowledgment of the absence of any meaningful Congressional guidance as to the specific purpose of Section 312(a)(7).

* As the Commission noted in its 1978 *Report and Order* concerning enforcement of Section 312(a)(7) (68 FCC 2d 1079), the only relevant time periods associated with statutory enactment of "reasonable access" are the 60 and 45-day periods established in connection with the separate "lowest unit charge" provision. Indeed, the Commission on that occasion specifically looked to the 60-day (general elections) and 45-day (primary elections) periods as governing many situations involving a determination of *when* "reasonable access" must begin. 68 FCC 2d at 1091. Moreover, the standard the Commission now applies—i.e., individual candidate needs—was not even mentioned in the context of developing interpretative guidance for when the time for reasonable access should initially commence. *Report and Order*, 68 FCC 2d at 1091-92. Rather, the only discussion of this criterion occurred in the totally different and broader context of how broadcasters should attempt to accommodate candiate requests in terms of scheduling, broadcast frequency, etc., once political sales are already underway. *Report and Order*, 68 FCC 2d at 1090-91.

The Commission has turned its back on traditional standards of license discretion in the political broadcasting area * and, in the first major interpretation of when "reasonable access" begins under Section 312(a), has not only ignored its own precedent, but has adopted a new standard of the expressed needs of individual candidates that raises serious constitutional and statutory questions.

Clearly, if the Commission is to be the ultimate judge of when a campaign begins and the particular point when the sale of political broadcast time must specifically commence, it has assumed a dangerous dictorial role for the government in a highly sensitive area that involves both the larger political process and the content and selection of broadcast programming.** In overturning ABC's decision to begin the sale of political time in January rather than December based on the avowed needs of one political candidate, the Commission has thrust itself too deeply into the political process, and assumed an editorial role over broadcasters that violates First Amendment principles protected by the Communications Act.***

Contrary to the Commission decision,**** ABC did not act in a manner that was oblivious to the needs of candidates. As the Commission was previously informed, in the last national Presidential campaign ABC did not

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* See *Report and Order*, 68 FCC 2d at 1089; *Use of Broadcast Facilities by Candidates for Public Office*, 24 FCC 2d 832 (1970); *Anthony R. Martin-Trigona*, 67 FCC 2d 743 (1978); *Evelle Younger*, 69 FCC 2d 1495 (1978); *Charles Mark Furcolo*, 48 FCC 2d 565 (1974).

** The troublesome character of this type of decision-making is reflected in the open deliberations on this matter (see transcript of open-meeting attached hereto as *Appendix A*).

*** See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974); Section 326 of the Communications Act.

**** See also *Transcript*, pp. 9-11.

afford program time until late April preceding the summer conventions. ABC's decision to advance that period by almost four months and to provide political time as early as the first week of January clearly was responsive to the requests that it was receiving from national Presidential candidates. These requests obviously reflected the individual needs of the candidates making them. ABC's decision to begin selling time in early January—well before the time period for political sales in prior years—represented an attempt to accommodate the overall needs of all candidates in the developing national campaign, not just the incumbent.

Notwithstanding, ABC believes the Commission has misconstrued the purpose of Section 312(a)(7) by focusing on the needs of individual candidates, as opposed to the needs of candidates in general in an overall campaign. This focus, we submit, distorts the process and places both the Commission and broadcast licensees in the dangerous position of effectively favoring one candidate over another. The standard the Commission relies on raises unusually sensitive constitutional and statutory questions. The difference between taking general needs of all candidates into account and relying on the particular needs and purposes of individual candidates is substantively dramatic. In our view, a standard that requires broadcasters to delve too deeply into the campaign objectives of individual candidates when time is requested or to weigh the nature or purpose of the political message they intend to convey is highly inappropriate and probably contrary to the Communications Act. See Section 315(a) of the Communications Act; *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). Similarly, the Commission's factual finding (*Memorandum Opinion and Order*, para. 36) "that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at

a later date" is inappropriate as a matter of law and highly questionable as a matter of fact.

Rather than applying Section 312(a)(7) equally to all similarly situated candidates, this decision permits one particular candidate (in this case the incumbent President) to assume a lead role in determining when to begin selling time and in what format, since licensee decisions looking to the overall campaign and all candidates have been declared unreasonable.

D.

The Commission's decision also minimizes and ultimately rejects such factors as the length of the campaign, the multiplicity of candidates involved and the potential degree of program interruption likely to occur. By rejecting these factors while exalting the factor of individual candidate needs, the Commission has failed properly to assess and weigh overall public needs and interests.

ABC's decision to defer the sale of political time until January—still nearly seven months prior to the first national nominating convention—attempted to assess the impact of such early political programming on the national audience it serves. Given the extended length of this particular campaign and the present multiplicity of Presidential candidates, we believe it is both reasonable and responsive to public needs to place some limitation on the period when half-hour network programs are devoted exclusively to political speeches and campaigning.* This does not mean, as we have previously emphasized, that campaign events are not fully and fairly reported in ABC news and public affairs programming—or that such news and public affairs coverage may not

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* See *Transcript*, p. 20, where Commissioner Washburn also notes that the factor of program interruption might be particularly aggravated here owing to the fact that the month of December is traditionally "given over in large part to the holidays."

significantly escalate.* It simply means that, based on past experience and an assessment of the events of the current campaign, that the public would not respond favorably to the program disruption associated with a parade of full-length paid political programs at this early, formative stage of the campaign.** Moreover, with respect to the specific request of the Committee, we were not uninfluenced by the fact that President Carter is in a unique position to command coverage of his views and positions on important matters. See, e.g., *Democratic National Committee* v. *FCC*, 460 F.2d 891, 905 (D.C. Cir. 1972).

As our original comments indicated, ABC's decision in this regard was also influenced by the sheer length of the 1980 Presidential campaign (36 state primaries running from late February to early June, followed by the general election process), the fact that during the pre-election period the campaign focuses primarily on delegate contests in individual states, and that, in addition to network political programs and advertising, our affiliated stations will have to accommodate the needs of local, state and federal candidates. Thus, throughout these many months of the 1980 political campaign, ABC network affiliated stations will be presenting not only net-

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* We strongly disagree with the suggestion that news and public affairs coverage of the campaign is a controlling factor in deciding when to begin the sale of half-hour political programs that interrupt normal programming. On the contrary, we believe that it is entirely reasonable and appropriate (indeed previous Commission interpretations would seem to support this approach) for ABC to consider the degree to which early political campaigning might unduly interfere with ABC's service to its overall viewing audience.

** In our view, once "reasonable access" is granted to one candidate, it will have to be granted to others. Moreover, once time has been granted, the "equal opportunities" provision of Section 315 mnadates that "access" be extended to other legally qualified candidates wholly apart from individual candidate needs (a concept that, as we have noted, is effectively applied only to *one* candidate in the context of this case).

work political programming, but significant amounts of political programming responsive to the needs of local, state and federal candidates in their individual service areas.

CONCLUSION

Even assuming the Presidential campaign is in "full swing", it does not follow that access for a particular candidate must commence at the announcement of his candidacy in order to be "reasonable".

Following the Commission's decision in this case we have had an opportunity to reassess the foregoing factors. That reassessment convinces us anew that ABC's decision to decline to sell the Carter-Mondale Committee a half-hour of time in December during the very early stages of the national political campaign was correct and, in any event, a reasonable exercise of broadcaster discretion.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By EVERETT H. ERLICK
1330 Avenue of the Americas
New York, New York 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Its Attorneys

November 23, 1979

[Appendix A, Transcript of Open Commission Meeting of November 20, 1979, is reprinted at pages 131-62 of this Joint Appendix; Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint
of the Carter-Mondale Presidential
Committee, Inc.

To: The Commission

MOTION FOR STAY

American Broadcasting Companies, Inc. (ABC), by its attorneys, herewith moves for a stay *pendente lite* of the *Commission's Memorandum Opinion and Order* (Order) released November 21, 1979, holding, *inter alia*, that ABC's refusal to sell one half-hour of prime political time to the Carter-Mondale Committee in December, as distinguished from the first week in January, was a denial of "reasonable access" in violation of Section 312(a)(7) of the Communications Act. In support thereof the following is shown:

1. ABC has today (the first business day following the November 21, 1979 (3:00 p.m.) release of the Commission's Order) filed a petition for reconsideration of the Order, urging the Commission to reverse what we believe to be an unlawful action. ABC urges prompt disposition of this petition. Should the Commission not grant the relief there requested ABC will promptly pursue judicial review of the Order in the United States Court of Appeals pursuant to 47 U.S.C. § 402 (a), and will seek an early court determination.

2. The Commission's decision raises very substantial and important legal issues, generally of first impression. Based upon no more than a statutory requirement of

reasonable access and without Congressional guidance, the Commission has abandoned traditional deference to good faith broadcaster judgments regarding program scheduling and accorded paramount importance to candidates' preferences as to when they shall appear. Moreover, the decision was by 4-3 vote, with two of the majority Commissioners stating at the November 20 open meeting that they viewed the case as extremely close (Transcript of Meeting, pp. 14-15, 31).

3. Further, implementation of the Commission's decision threatens substantial disruption of ABC's program schedule during the month of December, in disregard of ABC's good faith scheduling judgment and, we believe, in disregard of viewer preferences. It is reasonable to expect President Carter's party opponents to invoke equal opportunities rights and other candidates to seek prime political time in December.

4. The Commission's Order directs ABC to advise the Commission by November 26, 1979 of how it intends to fulfill its Section 312(a)(7) responsibilities with respect to the Carter-Mondale Committee's request for prime political time in early December. However, unless the Commission grants ABC's petition for reconsideration by November 26 (in which case this motion would be moot), there would appear insufficient time between now and that date to obtain a resolution of the very substantial and important legal issues.

5. Further, there would appear no need for ABC to take immediate action on the Carter-Mondale Committee's request. President Carter is not a legally qualified candidate (as defined by this Commission). According to press reports, he does not plan to announce his candidacy until the evening of December 4, 1979. Stay of the Commission's November 26 advisement date, coupled with accelerated Commission action on reconsideration and judicial review if necessary, would appear to be

consistent with implementation of the Order should it be sustained.

6. Accordingly, ABC urges the Commission to stay its Order pending action on reconsideration and judicial review if necessary. Further, ABC urges the Commission to act as promptly as possible on petitions for reconsideration, and to cooperate in seeking expedition in the judicial review process.

Respectfully submitted,

AMERICAN BROADCASTING COMPANIES, INC.

By EVERETT H. ERLICK
1330 Avenue of the Americas
New York, New York 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
McKenna, Wilkinson & Kittner
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Its Attorneys

November 23, 1979

[Certificate of Service Omitted in Printing]

MEDIA
ACCESS
PROJECT

1609 Connecticut Avenue, N.W., Washington, D.C. 20009
(202) 232-1300

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 79-750

In the Matter of

Complaint of the Carter-Mondale
Presidential Committee, Inc.

OPPOSITION OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING TO NETWORKS' PETITIONS FOR STAY

The National Citizens Committee for Broadcasting (NCCB), by its counsel, the Media Access Project, hereby opposes the petitions filed by the three networks for stay of the Commission's November 21, 1979 order in the above-captioned proceeding.

The traditional criteria for granting of stays, which have been adopted and utilized by this Commission, include three elements: a strong showing of a meritorious appeal, irreparable injury, and the absence of harm to other parties. *See, e.g., Cable TV Pole Attachment Regulations*, 73 FCC2d 1 (1979). We will not here address the first issue, since we believe the Commission's action herein is powerfully supported in the Commission's November 21, 1979 decision.

Notably lacking from any of the petitions for stay is any claim, much less a showing, of irreparable injury.[1] It is NCCB's position that no significant harm will inure to any of the networks by the operation of the Commission's order. In fact, all that is required therein is that the networks state how they will comply with the order. Assuming that CBS, NBC, or ABC would adopt a cooperative position and set out a means of complying with Section 312(a)(7), all that would be involved would be the selection by the network of a time period for the sale to the complainant. Such a sale would result in revenue at the network's normal rate for such broadcasts (NBC estimates the value of a half hour of prime time at $125,000 to $150,000). Indeed, one of the networks, CBS, routinely permits "runovers" for every Sunday football game which continues into the "Sixty Minutes" timeslot.

As the Commission has noted, the real rights in interest here are those of listeners. As the networks must be reminded all too often, it is the right of the public to receive information which is "paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). The grant of a stay would severely limit the ability of the electorate to be exposed to the most significant kind of political speech imaginable—political campaign rhetoric.

NCCB also notes with disappointment that the networks have apparently declined to follow the Commission's clear suggestion at footnote 34 of the November 21, 1979 order that some sort of negotiated resolution of the matter would be desirable for all parties involved.

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[1] NBC does allege that enforcement of the Order would require "significant dislocation of NBC's programming schedule." Such disruptions are, of course, a way of life for the networks. News events of many kinds, sports programs and many of their own special entertainment programs disrupt schedules. The harm is neither serious nor irreparable, especially where paid programming is involved.

The unfortunate need for government interference in this matter is a function of the refusal of the broadcast industry to adopt a posture which would permit the dispute to be handled privately amongst private citizens. Broadcast licensees cannot be heard to complain about such federal involvement when they have taken a rigid and uncompromising posture that rules out any form of settlement which would not require intrusion by the Commission.

In short, the denial of a stay would cause no harm to any of the networks, and no such harm is even alleged. By contrast, the superior rights of the public to be exposed to information would be severely and irreparably harmed if the stay were granted. And, most importantly, an unnecessary confrontation will apparently occur in the courts because of the unreasonableness of the broadcast industry in failing to accept the need to accommodate conflicting needs by altering an unyielding position.

Respectfully submitted,

/s/ Heidi P. Sanchez
HEIDI P. SANCHEZ

/s/ Andrew Jay Schwartzman
ANDREW JAY SCHWARTZMAN
MEDIA ACCESS PROJECT
1609 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 232-4300
Counsel to National Citizens
Committee for Broadcasting
1530 P Street, N.W.
Washington, D.C. 20005

November 23, 1979

[Certificate of Service Omitted]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of

Carter-Mondale Presidential
Committee, Inc.

against

The ABC, CBS and NBC Television
Networks

OPPOSITION TO PETITIONS FOR STAY

The Carter-Mondale Presidential Committee, Inc. (hereinafter "Committee"), strenuously opposes the petition of CBS, Inc. to stay the Commission's Order, FCC 79-750, released November 21, 1979, finding that the three television national networks have failed to comply with Section 312(a)(7) of the Communications Act and directing each network to advise the Commission as to how it intends to fulfill its obligations on or before November 26, 1979.*

No basis or justification whatsoever has been set forth by CBS to support the requested stay. Essentially, all that has been argued is that the Commission's Order "raises substantial questions" of law and that CBS will undertake to pursue an appeal as expeditiously as possible. These bare allegations fall woefully short of the standards followed by this Commission for granting a stay as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958).

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* This also responds to requests for stay filed by NBC and ABC today which the Committee has just received. These appear to make essentially the same arguments and are similarly lacking in support.

First, no showing has been made or even attempted that CBS is likely to prevail on the merits of its appeal. Second, CBS has not even alleged that it will suffer irreparable injury in the absence of a stay. Third, as shown below and in the attached affidavit, the issuance of a stay in this case would substantially harm the interests of the complaining party in the proceeding. Fourth, CBS has made no showing that the public interest would be served by a stay. To the contrary, the public interest requires that the Commission's decision be promptly implemented. CBS apparently does not appreciate that its interests as a private litigant in this matter ". . . must give way to the realization of public purposes." *Virginia Petroleum Jobbers Association* v. *FPC*, *supra*, 295 F.2d at 925.

If a stay is granted, the interests of the Committee will be substantially harmed. In all likelihood, the relief accorded by the Commission will be effectively mooted. The Committee had sought (and still seeks) to purchase a half-hour on one of the three national television networks on the evening of either December 4, 5, 6 or 7, 1979. December 4, the first day requested, is now ten days away. As reflected in the attached affidavit, substantial advance planning and arrangements are necessary to utilize the time period effectively in accord with the Committee's original plans which were described in its October request to the networks and subsequent filings. The intended "use" for which the time has been sought is planned to coincide as close as possible with the President's formal announcement of his candidacy for re-election on December 4, 1979. Due to various considerations, including pertinent requirements of law concerning campaign activities and filing deadlines, this announcement cannot be postponed until a later date. Therefore, unless the Commission's order is promptly implemented, a Presidential candidate's access rights un-

der the Communications Act will have been effectively frustrated with no satisfactory substitute available at a later date.

The networks apparently would have a Presidential candidate completely alter his fundamental campaign strategy and timing to conform to their desires and selling policies. From the outset of this matter, the Committee has endeavored to pursue its request with the needs of the networks in mind and to give the networks maximum flexibility in responding so as to not disrupt their normal commercial operations.* In return, we have been met by an attitude of indifference to our needs and a pattern of refusals, both before and after the Commission's order, to enter into good faith negotiations, as urged by the Commission. *Order*, ¶ 49. If this posture of willful defiance continues past November 26th, it will be incumbent on the Commission (rather than staying its order) to undertake enforcement measures under Section 312.

CBS and the other networks, had they wanted to, previously have had ample opportunity to litigate the constitutionality and/or application of Section 312(a)(7). The Commission's Order essentially does no more than apply the enforcement policies which the Commission announced it would follow in its 1978 Policy Statement, *Commission Policy on Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978). The networks participated fully in the proceeding leading to

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* See *Order*, ¶ 44. The Committee sought to purchase one of the networks' normal program time units and, by requesting availabilities over a four day period, gave the networks considerable scheduling latitude in responding. Moreover, the Committee realized that the requested December period would be outside the networks' November audience measurement periods and therefore could not possibly prejudice the networks from this standpoint.

the adoption of this Policy Statement.* They had every opportunity at that point to appeal on the purported "substantial questions" of law and constitutionality raised by the order. They chose not to do so and should not now be permitted to frustrate a Presidential candidate's statutory rights and an Order of this Commission under the pretext of seeking judicial review of a novel and unprecedented action.

For these reasons, the requests for stay should be immediately denied and the three networks directed to comply with the Commission's order on or before November 26, 1979.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
Ramsey L. Woodworth
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

November 23, 1979

[Certificate of Service Omitted in Printing]

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* CBS filed comments in B.C. Docket 78-102 on Commission Policy in enforcing § 312(a)(7). It was aware of the FCC's practice to exercise jurisdiction over the networks in political broadcasting matters, but did not raise any jurisdictional objection at that time. Moreover, while it did raise First Amendment questions, it did not seek judicial review of the Commission's Report and Order. ABC and NBC also participated in the proceeding.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

IN RE: COMPLAINT OF THE
CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

AFFIDAVIT OF GERALD M. RAFSHOON

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

GERALD M. RAFSHOON, being duly sworn, does depose and say:

1. I am President of Rafshoon Communications, which is under contract to the Carter-Mondale Presidential Committee, Inc. ("CMPC") for production and placement of media advertising in connection with the 1980 primary elections and caucuses.

2. In consultation with CMPC, I have directed the preparation of a documentary film on the President and his Administration to be used by the President in conjunction with his announcement concerning his candidacy in the first week of December 1979. This film has been prepared at considerable effort and expense to CMPC and is designed to be the principal means to inaugurate the President's campaign.

3. From the outset of this matter the CMPC and I have attempted to cooperate with the networks and to take into account their needs and concerns. Thus, we requested time for our program almost two months before it was to be aired. In order to afford additional programming flexibility for the networks, we also gave each network the option of running the program in any one of five half-hour slots on any one of four dates. To minimize the chances for any competitive or financial

harm to the networks, we did not ask for the program to be shown until the first week in December, which is after the period in which network ratings are determined.

4. Also in an attempt to reach a voluntary and cooperative resolution of this matter, I asked counsel for the CMPC immediately following the Commission action on our complaint on Tuesday, November 20, 1979, to open a dialogue with counsel to the networks as to how and when compliance with the Commission's decision might best be achieved. I am advised that counsel for each of the networks informed Mr. John D. Lane, counsel to the CMPC, that they did not wish to discuss any such actions until they had reviewed the Commission's formal order.

5. Also on Tuesday afternoon, November 20, 1979, I independently contacted sales representatives of each of the networks to seek to open discussions concerning placement of our program in light of the Commission's action. Mr. Charles Allen of ABC responded that he had to await advice of counsel and review of the Commission's written order, and thus there was no reason to discuss any program placement. Mr. Raymond Dillon of CBS responded that no such discussion was necessary since CBS intended to contest the Commission's decision. Mr. Jo Iaricci of NBC responded by stating that he would have to check to see what times were available on our requested dates and that he would have to check with counsel, but that he would get back to me. Mr. Iaricci, however, has not responded further.

6. On Wednesday, November 21, 1979, after the Commission issued its order, I sent telegrams to the presidents of each of the networks inviting them or a designee to attend meetings in Washington on Friday, November 23, 1979, to discuss sale of the half-hour in question and compliance with the Commission's order. To ensure that the messages would be received, I instructed my assist-

ant, Becky Hendrix, to call the offices of each of the addressees. After she was informed in each case that the networks would be closed until Monday morning, November 26, 1979, Ms. Hendrix, at my suggestion, read the contents of the telegram to the secretaries of each addressee. The same afternoon, Mr. Everett Ehrlich of ABC responded by telephone that there would be no use having a meeting since ABC intended to contest the Commission's order. Also on Wednesday afternoon, Mr. Gene Mader of CBS responded that CBS would not participate at such a meeting. On Friday morning, November 23, 1979, Mr. Howard Monderer of NBC responded to the same effect. Each of these responses were made notwithstanding the Commission's suggestion in its Memorandum and Order (paragraph 49 and footnote 34, thereto, at 23) that such meetings and good faith negotiations should occur. (See Exhibit B.)

7. Based on the above, it is obvious that immediate enforcement of the Commission's order is required if the CMPC is to have any meaningful relief in this case. Further delay and refusal to obey the Commission's instructions will moot the CMPC's case and abrogate its reasonable access rights in complete definance of the Commission's decision on the merits.

8. This result would cause serious and irreparable harm to the President's re-election campaign. As previously noted, the purpose of the program in question is to inaugurate, and set the tone for, the official and formally announced portion of the President's campaign by describing the record of his Administration and the case for a second term in a thoughtful and complete manner. Thus, to achieve its central purpose, it must appear as close as possible to the President's planned announcement of candidacy on December 4, 1979. At least one week's lead time is required to promote this program properly in order to inform the public of its showing and to assure an adequate viewing audience.

9. Furthermore, the date for the President's announcement cannot be postponed without great disruption and political and financial harm to his campaign. The December 4th announcement date has been set for nearly 10 weeks, and a great deal of fundraising and campaign activity has been planned around it.*

10. I am personally aware that CMPC political organizers, volunteers, fundraising committees, and other workers are active in more than 25 states to raise necessary contributions, to circulate nominating petitions to place the President on the ballot, to recruit delegate candidates and form delegate slates, and to perform many other basic campaign activities. For example, the CMPC has maintained a headquarters in Concord, New Hampshire since May and now has four offices and several paid staff members in the state. There is a New Hampshire campaign steering committee of over 500 persons. The CMPC is currently passing petitions to put the President's name on the New Hampshire primary ballot. In Iowa, the CMPC has an office in Des Moines with a staff of over ten persons and a state steering committee of more than 150 persons. In Florida, the CMPC maintains offices in Orlando, Miami, and Tallahassee, and mounted a successful effort in the October 13th county caucus and the November 18th State Democratic Convention straw ballot there. In Minnesota, the CMPC has an office, several employees and a steering

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* Should the events in Iran or elsewhere preclude the President's personal involvement in normal campaign activity during this period, it would make all the more important that his campaign continue through other means. Purchased television time under the circumstances would be the only effective method to communicate his case for reelection directly to the American people. In any case, for the reasons set forth at paragraph 11, *infra*, the President will take all necessary steps, including a public announcement of candidacy, to become a legally qualified candidate before airing of the program.

committee of over 1,500 persons. In Illinois, the CMPC has offices in Springfield and Chicago, with several paid employees who are currently supervising the passing of petitions required to place the President's name on the March 18, 1980 primary ballot there. In New York, the CMPC has an office in New York City with several employees and has done initial organizational work in all parts of the state. In Georgia, the CMPC has operated a Shoutheast regional office since the spring with two full-time employees and numerous volunteers. A major fundraising event has been held in Atlanta. In Oklahoma and Texas, there is a full-time coordinator, large steering committees, and active fundraising events. In California, a steering committee was announced in July; there is also a state coordinator, a small staff, a fundraising committee, and numerous volunteers. Additional such information on other states can be provided, if necessary. Finally, the First Lady, the Vice President, and other representatives of the President have made numerous campaign speeches and other CMPC-sponsored appearances in these and other states over the last several months.

11. Further, it is important to note that December filing requirements in New Hampshire and Illinois preclude any substantial postponement of the President's formal announcement of candidacy.

12. Moreover, for more than six weeks, the CMPC has been recruiting persons from all over the country to hold small-donor fundraisers in their homes during the week of the President's announcement. The key to the planning and promotion of these events is the opportunity to watch the half-hour program as the focal point and highlight of each fundraiser.* CMPC has been able to

* While the CMPC was able in early October, when it first approached the networks, to provide a range of dates (December 4, 5, 6, and 7) from which the most convenient could be chosen, it now

recruit over 1,500 hosts and hostesses for such events. We anticipate having 2,000 homes participating in these events by December 4th. If, however, relief is delayed, it would be impossible to implement this program successfully and the CMPC could lose as much as $1,000,000 in small donations at this critical period in the campaign.

13. There are no feasible alternatives to purchasing time for the half-hour program on one of the three respondent networks on, or as close as possible to, the date of the President's announcement as originally requested. Delaying the broadcast will defeat its whole purpose. Attempting at this point to purchase comparable time on the hundreds of individual stations required to duplicate network coverage would be prohibitively expensive and logistically impractical, if not completely impossible.

14. Finally, I am aware that only two other Presidential Candidates, Ronald Reagan and John Connolly, to date in this campaign, have sought to purchase half-hours of network time for paid political programs.* I have been informed that Mr. Reagan's campaign no longer desires to purchase such time this year. I am

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needs a definite date in order that the hundreds of hosts and hostesses of the small-donor fundraising parties described above will have adequate notice to invite potential contributors. Accordingly, after failing to obtain a stipulation from any of the networks of a specific date on which the program would be shown if the CMPC prevailed before the Commission, the CMPC on November 21st informed these hosts and hostesses that it would make every effort to have the program shown on Tuesday, December 4th, the date of the President's announcement.

* It should also be noted that President Carter's campaign is the only campaign among the contenders for the Democratic Presidential nomination to have qualified for federal matching funds. Therefore, the networks, as a practical matter, are unlikely to face Section 315 "equal opportunity" requests from either the Kennedy or Brown campaigns.

aware that Mr. Connolly's campaign does intend to continue to seek such time. (See *New York Times* article of November 23, 1979, attached as Exhibit A.) Thus, it appears that only one other Presidential candidate besides President Carter seeks to purchase such time, and therefore that the networks' "multiplicity of candidates" and "programming disruption" arguments are, at best, exaggerated and speculative.

15. The CMPC has been as cooperative as possible in seeking to accommodate the legitimate concerns of the networks in connection with its request for time and with this proceeding. Unfortunately, it is now clear that the networks do not intend to comply with either the CMPC's request or the Commission's order and instructions. It is also clear that, absent further prompt Commission action, the President's reelection campaign will be seriously and irreparably damaged by the networks' refusal to sell the requested time.

/s/ Gerald M. Rafshoon
GERALD M. RAFSHOON

Subscribed and sworn to, before me,
this 23rd day of November, 1979.

/s/ [Illegible]
Notary Public

My Commission Expires April 30, 19**

EXHIBIT A

NEW YORK TIMES, *Friday, November 23, 1979*

ACCESS RULES FOR NETWORKS

Carter's Victory Raising Questions on Adequacy

BY ERNEST HOLSENDOLPH

Special to The New York Times

WASHINGTON, Nov. 22—Hardly anyone feels comfortable with the role of the Federal Government in deciding who shall have access to the airwaves, but while Congress is re-examining the rules, there seems to be no quick or obvious alternative.

News Analysis

The application of the rules has tripped politicians on occasion, or come close to doing so, as in the narrow 4-to-3 Federal Communications Commission victory for President Carter on Tuesday granting him network time next month to announce his candidacy for re-election. At other times, corporations have been blocked in presenting messages, even though they were willing to pay to get them broadcast.

Much is at stake for political candidates. The increasing power of radio and especially television broadcasting to make candidates recognized and electable, and changing patterns in Presidential electoral politics, which have made state primaries more pivotal in campaigns for party nominations, have put increased pressure on the creaky rules for governing access to the air.

The rules that apply to these access questions include the fairness doctrine, which requires broadcasters taking up important community issues to see that all sides are treated; "reasonable access" for qualified political office seekers, and equal time for all qualified candidates for an office if time has been made available for one.

In the words of Representative Lionel Van Deerlin, chairman of the House Communications Subcommittee, it is some * * *

'Reasonable Access'

On Tuesday the Carter-Mondale Presidential Committee, under the rule that says legally qualified candidates are entitled to "reasonable access" to the airwaves, persuaded the Federal Communications Commission to declare the networks unreasonable in denying President Carter 30 minutes of prime time next month. The ruling puts into effect a requirement for equal time for political opponents, and Gov. John B. Connally's representative here said the Republican Presidential aspirant would also try to obtain network time.

Meanwhile, Gov. Edmund G. Brown Jr. has been excluded from a debate between President Carter and Senator Edward M. Kennedy on television in January on the legal ground that the appearances are sponsored by a third party, The Des Moines Register, and are thus exempt from equal time requirements.

While broadcasters, under certain circumstances, are expected to operate like newspapers and aggressively seek news and information, rules sometimes compel them to behave otherwise.

For instance, both the Kaiser Aluminum and the Mobil Oil Corporations have tried to present paid messages on the air about various issues and have been turned down because the broadcasters fear that they will be compelled to allot time for responses as an obligation

under the fairness doctrine. Mobil has been rejected, even though the company proposes to pay for time of parties that demand equal time.

Doubts About Doctrine

In a talk in Houston to broadcasters Tuesday, Mr. Van Deerlin wondered aloud how well the fairness doctrine, equal time and reasonable access requirements could be serving the public "when a fear of triggering equal time causes the three networks to refuse time to the Carter-Mondale campaign organization; or when the exemption for debates sponsored by a third party leaves a Jerry Brown without redress; or when Ronald Reagan has to beg for time from scattered independents because he can't get it from networks?"

Since the appearance of one major candidate not only opens the door but also invites opponents to come in and ask for time, the CBS, NBC and ABC networks * * *

Tyrone Brown, an F.C.C. commissioner who once served as the general counsel for Post Newsweek broadcast stations here, recalled Tuesday that harried program directors would come in and ask him in the spring: "Is it time for the campaign to start now?" This meant, he said, was it appropriate to take the first advertisement?

Mr. Brown, who voted to support the Carter petition, said he felt uncomfortable in that role. However, a high official for ABC, voicing another concern in an interview Tuesday, said:

"We're concerned when any candidate, whenever he chooses, and however early, can come in and demand to be satisfied with access and length of time."

Prime Time Pre-emption

For the broadcasters, according to their testimony, opening the gates, especially in a crowded campaign such as the upcoming contests for the Republican and Democratic nominations, could mean pre-emption of prime time by a parade of candidates and financial losses because political advertisers do not pay sums equal to the advertising time afforded by even a modestly popular situation comedy.

Despite some problems, the commission chairman, Charles D. Ferris, said today that he would "leave the rules just as they are."

He said that he agreed with Mr. Van Deerlin that "in a perfect world, where there is enough competition" there might not be a need for the access rules and requirements.

"But right now there is no other way to deal with the economic motivations of the broadcasters, the rights and needs of the various political candidates or the public's interest in a full flow of information," Mr. Ferris said.

Meanwhile, Congress is examining the impact of the current rules and could provide some modification in the communications legislation that may be presented soon, sources on Mr. Deerlin's committee * * *

EXHIBIT B

(Dictated to Western Union operator 229
11/21/79 2:30 p.m.)

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. Fred Silverman
President
NBC, Inc.
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Silverman:

Could you—or your designee authorized to speak for NBC—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 12:00 noon Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Ann in Silverman's ofc. 212/664-4555)

RAFSHOON
COMMUNICATIONS [SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. Elton Rule
President
ABC
1330 Avenue of the Americas
New York, New York 10019

Dear Mr. Rule:

Could you—or your designee authorized to speak for ABC—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 10:00 a.m. Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Maureen Hayden, Rule's ofc. 212/887-7777)

RAFSHOON
COMMUNICATIONS

[SEAL]

1775 Pennsylvania Avenue NW
Suite 1250
Washington, D.C. 20006
202/293-5454

Mr. John Backe
President CBS, Inc.
51 West 52nd Street
New York, New York 10019

Dear Mr. Backe:

Could you—or your designee authorized to speak for CBS—please attend a meeting in my office at 1775 Pennsylvania Avenue, NW, Suite 1250, Washington, D.C. at 11:00 a.m. Friday, November 23, 1979, to discuss sale of half-hour to Carter/Mondale Committee to comply with FCC decision.

Sincerely,

GERALD M. RAFSHOON
President

(Dictated to Joan Murphy, Backe's ofc. 212/975-5152)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of:

Carter-Mondale Presidential Committee, Inc.

Against

The ABC, CBS and NBC Television Networks

To: The Commission

OPPOSITION TO PETITIONS AND REQUESTS FOR RECONSIDERATION

The Carter-Mondale Presidential Committee, Inc. ("Committee") opposes the petitions and requests for reconsideration of the Commission's Memorandum Opinion and Order ("MO&O") in the above matter,* filed by each of the three national networks.

The networks' responses to the Commission's order of November 20th evidence a disturbing disregard for their obligations both under Section 312(a)(7) and as the most important and powerful group of licensees under the Commission's jurisdiction. Rather than attempt even to discuss compliance with a lawful and reasonable order of this Commission (which should have been unnecessary in the first place), the networks' responses amount to the "stonewalling" not only of a Presidential candidate, but also of this Commission and the public interest.

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* FCC 79-750, released November 21, 1979. The arguments raised by the networks are essentially identical and thus may be answered in one pleading. Inasmuch as the NBC and ABC requests were not received by the Committee until the afternoon of November 23rd at approximately 1:00 p.m. and 4:30 p.m. respectively, all references will be to the CBS petition unless otherwise noted.

Since the Commission's action on Tuesday afternoon, the networks have:

(A) refused to engage in any substantive discussion with the Committee to resolve the matter (in complete disregard of the Commission's urging); *

(B) refused thus far to comply with the Commission's instructions to advise the Commission no later than November 26th as to how they intend to fulfill their Section 312(a)(7) obligations; and

(C) pursued a course of action which can only serve to frustrate the relief granted and effectively deprive a Presidential candidate of his statutory rights.

Their actions collectively constitute a blatant challenge to the Commission's mandate which, if permitted to continue, will give the Commission no choice but to exercise the full powers at its disposal under the Act to insure the integrity of its Orders.

As hereinafter shown, the networks have raised no new arguments or facts that require the Commission to revisit, let alone reverse, its November 20th Order. The networks completely exaggerate both the so-called unprecedented nature of the Order and its impact on their operations. Notwithstanding their characterizations, the moderate action taken was clearly envisioned by, and is in accord with, the Commission's 1978 *Policy Statement on Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). The networks participated fully in the proceedings leading to the adoption of this *Policy Statement* and had

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* *MC &O*, p. 23, N. 34. This course of events is set forth in the affidavit attached to the Committee's Opposition to Petitions for Stay, filed yesterday.

every opportunity to appeal at that time without prejudicing and frustrating the rights of a Presidential candidate during his campaign.

Moreover, again notwithstanding their characterizations, the commission's order gives due and, if anything, excessive deference to the traditional licensee discretion test applied by the Commission in political broadcasting matters.* The networks confuse the responsible exercise of their discretion in meeting the requests of Federal candidates under Section 312(a)(7) with blind adherence to predetermined and arbitrary policies. Such policies may have been acceptable prior to the enactment of the Section 312(a)(7) but now must give way to the realization of valid public purposes. If Section 312(a)(7) is to have any real meaning, the Order of November 20th must be strongly reaffirmed and enforced by the Commission.

I. *The Requests Fail to Set Forth Any Basis For Reconsideration*

CBS' Petition and the other requests do not comply with the requirements of Section 1.106 of the rules, nor do they even attempt to demonstrate compliance with that rule. Nor have they brought any new matters to the attention of the Commission. The petitions are essentially *ex post facto* rationalizations of arbitrary, prior decisions, fashioned to meet points raised during the Commission's November 20 open meeting and the *MO&O*.

The Networks' claims to have considered the needs of the candidate are clearly unsupportable in light of the facts already in the record. It is obvious from CBS' own October 17, 1979 letter of rejection that it did not

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* This test was modified by the enactment of Section 312(a)(7) insofar as Federal candidates are concerned to provide for the needs of the candidate as well as the broadcaster. See Committee Reply, pp. 7-9.

consider the Committee's and President Carter's needs, but only its own concerns. (Committee Complaint, Exhibit B pp. 3-4.) As found in the MO&O, CBS could not have objectively considered the Committee's needs because of its absolute and predetermined policy, adopted no later than September, 1979, not to sell half-hour programs and to offer only five-minute programs to candidates. No amount of rhetoric at this time can change that fact. Moreover, its five-minute counter-offer fell completely outside the four day time span requested by the Committee and was therefore completely unresponsive for this additional reason.

Similarly, ABC's and NBC's claims are transparent. How could ABC really have considered the needs of the candidate when its policy as of the Committee's initial request did not even provide for the sale of time? While ABC's policy has shifted, it should be emphasized that it still has *not* offered to sell any time to the Committee.

Even now, the networks' refusals are not responsive to the factors described in the Commission's 1978 *Policy Statement on Enforcing Section 312(a)(7)* and its Order of November 21st; rather, they are based on irrelevancies such as the amount of news coverage normally given an incumbent and on insistent restatements of the networks' unique ability and unilateral right to determine viewer preferences and the time when campaigns should begin. Thus, ABC, for example, seeks to support its Petition for Reconsideration with such extra-statutory logic as:

> . . . the public would not respond favorably to the program disruption associated with a parade of full-length paid political programs at this early, formative stage of the campaign. (Petition at 10); and
>
> Even assuming the Presidential campaign is in "full swing," it does not follow that access for a particu-

lar candidate must commence at the announcement of his candidacy . . . (Petition at 11).

II. *The Commission's Decision Properly Considered All Relevant Factors and Reached the Right Conclusion*

CBS claims that its refusal to sell the Committee a prime-time half-hour between December 4 and 7 was an "editorial decision" * of the type supported by the Supreme Court in *CBS* v. *DNC*, 412 U.S. 94 (1973). This case has no direct bearing on the application of Section 312(a)(7). The Supreme Court therein dealt with the application of the Fairness Doctrine to editorial messages and the rights of broadcasters to present the discussion of public interest issues. That is clearly different from the application of a specific statute enacted by Congress (with knowledge of the then-pending *CBS-DNC* controversy) granting Federal candidates the right, *inter alia*, to purchase a reasonable amount of time to further their candidacies.

Nor is the brief footnote in the *DNC* case relied on by CBS alluding to this Congressional enactment significant. The FCC, which has the initial and primary responsibility of interpreting the Communications Act, already has specifically determined that Section 312(a)(7) is *not* simply a codification of prior law. In a thorough review and interpretation of the provision just last year, the Commission said that the provision imposed a *different* and *additional* obligation on broadcasters toward Federal candidates. *Enforcing Section 312(a)(7), supra.*

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* If true, we find it surprising that CBS' policies (as well as those of the other two networks) permit such a decision to be handled by advertising sales representatives. See Attachment B to Complaint, p. 4.

CBS contends that Congress expressed a desire to limit the length of political campaigns. In fact, Congress rejected a proposal to limit campaigns. *Enforcing Section 312(a)(7), supra,* 68 FCC 2d at 1081. Furthermore, as the Commission plainly concluded, the Presidential campaign has begun and is in full swing. The time frame of previous election seasons is not relevant to this campaign, since it has already begun. Moreover, ABC's concern that the Commission has too deeply involved itself in determining when a campaign begins is similarly specious. The Commission was most careful to avoid such involvement, rather basing its decision on a thorough analysis of the objective, extrinsic facts before it.

CBS places great reliance on *Letter to Paul A. Talmey,* 31 RR2d 1309 (1974). That staff opinion which predates the Commission's 1978 Policy Statement is not on point. The licensee in that case, unlike the networks, *did* agree to sell the candidate a half-hour program. The candidates' complaint concerned the precise time of the broadcast whereas the Committee has given CBS and the other networks considerable leeway—a choice of twenty half-hours per network.

Next, CBS reraises the contention that the FCC lacks jurisdiction to apply Section 312 to network operations, even though it was fully considered by the Commission in its decision. The logical conclusion to be drawn from CBS' position is that, even though the networks are licensees and act as agents for their affiliates (MO&O, ¶ 22), the networks would never have access obligations to Presidential candidates. Thus, candidates for the Presidency—the only nationally elected office—could only deal with individual stations. This would not only be costly, burdensome and contrary to the intent of Congress to control the costs of political campaigns, but also it would drastically curtail the process of informing the electorate, again contrary to the intent of Congress.

The networks are the most influential and powerful broadcast organizations in this country, whose policies and activities set the tone for the entire industry. Before the adoption of section 312(a)(7), other political broadcasting requirements had been applied to the networks, and it is inconceivable that Congress would have exempted them from access obligations when it adopted Section 312(a)(7). Furthermore, as the Commission notes, networks always have been included in the definition of the term broadcasting station. *MO&O*, p. 9. Finally, the FCC has specific and direct jurisdiction over the activity of networking under Section 303(i) of the Communications Act which authorizes the Commission to regulate "chain broadcasting."

CBS also reraises the First Amendment argument about the constitutionality of Section 312(a)(7), even though it, too, has been considered by the Commission. E.g., *MO&O*, p. 15. This argument fails to appreciate the fundamental fact that it is the public's First Amendment rights that are paramount. Section 312(a)(7) advances the right of candidates to inform the public, and more importantly, the primary right of the electorate to be informed. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

Finally, the networks again seek to demonstrate the reasonableness of their actions through rearguing such points as the "multiplicity of candidates" and "program disruption" defenses.* Again, these alleged considera-

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* The networks' continued suggestions that the President may not be a legally qualified candidate at the time of the broadcast are not well taken. As further described in the affidavit of Gerald M. Rafshoon appended to the Committee's Stay Opposition, President Carter, through his authorized campaign committee, clearly has made a substantial showing of *bona fide* candidacy in more than ten states. Moreover, as has been widely reported in the media, the White House has announced that the President intends to formally declare his candidacy on December 4, 1979, and the time requested is expressly designed to follow *after* his announcement.

tions are essentially restatements of arguments made in their responses and have already been fully considered and rejected by the Commission. They are not grounds for reconsideration.

CONCLUSION

In their Petitions, the networks have raised nothing new of any significance. Their essential arguments have already been rejected by the Commission. What the present situation comes down to is as follows. In early October, the Committee sought to purchase one thirty-minute time period from one of the networks between December 4th and 7th. The Committee was totally rebuffed. Now over six weeks later, the situation remains the same: total unwillingness by the networks to consider the Committee's needs or even to enter into discussions with the Committee to try to resolve the matter. In effect, the networks stand on the brink of defiance of the Commis-

sion. If the Committee is to have any hope of securing effective relief, this situation must be corrected at once.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
CARTER-MONDALE PRESIDENTIAL
COMMITTEE, INC.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
Ramsey L. Woodworth
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs, Jr.
1822 Jefferson Place, N.W.
Washington, D.C. 20036

November 24, 1979
12:30 p.m.

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of the
Carter-Mondale Presidential
Committee, Inc.

CBS REPLY TO OPPOSITION TO PETITIONS FOR STAY

We believe that the Opposition to Petitions for Stay filed by the Carter-Mondale Presidential Committee, Inc. (the "Committee") fails to show that a stay should not be granted pending reconsideration and judicial review. We briefly address here the question whether a stay should be granted pending judicial review if reconsideration is denied.

1. In view of the equities (see below) a stay pending judicial review should be granted if substantial questions are presented. *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (1977); *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973).

2. It cannot be disputed that this case presents substantial questions. The decision was rendered by a bare 4 to 3 majority of the Commission, and three of the members of the Commission majority indicated in their separate concurring opinions that this is a particularly close case. Separate Statement of Charles D. Ferris, Chairman and Commissioner Joseph R. Fogarty; Statement of FCC Commissioner James H. Quello. See also Transcript of Public Meeting, pp. 14-15, 31.

3. Moreover, even if a more stringent standard were applied, CBS believes that it has established a strong likelihood of prevailing on the merits. For example, the Commission has erroneously declined to decide the substantial constitutional issues and in suggesting that Section 312(a)(7) was designed to do more than "codify" pre-existing Commission requirements under the public interest standard, the Commission has rendered a decision directly contrary to the Supreme Court's finding in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12 (1973) that Section 312(a)(7) "essentially codified the Commission's prior interpretation. . . ."

4. The Committee has failed to establish that it would suffer significant injury if a stay were granted pending a prompt judicial review proceeding. Most of its showing is devoted to alleging that injury would occur if President Carter's announcement of his candidacy for reelection were delayed. No suggestion has been made that that announcement should be delayed. The Committee argues primarily that "substantial advance planning and arrangements have been necessary to utilize the time period effectively . . .," *id.* at 2. The Committee appears to argue that "at least one week's lead time is required to promote this program properly in order to inform the public of its showing and to ensure an adequate viewing audience." Affidavit attached to Opposition, p. 4. The Committee fails to establish why a few days delay in the exhibition of this program, or in the accompanying "home viewing parties" would cause it irreparable injury. In any event, if the stay is granted, there is reason to believe that the case could be briefed, argued and decided in the Court of Appeals approximately one week in advance of the last broadcast date selected by the Committee. (This could be accomplished if the case were briefed, argued and decided during this week.)

5. CBS would suffer irreparable injury, as would the public interest, if a stay were not granted. The loss of First Amendment rights is irremedial,* and the public interest would clearly be injured if CBS were compelled to sell program time to the Committee when the Congressional purpose required deference to CBS' editorial judgment. Moreover, if a stay were not granted pending judicial review; the program time was purchased by the Committee, and it was later determined that the Committee was not entitled to time, other candidates seeking to purchase time on the CBS Television Network pursuant to Section 312(a)(7) would be disadvantaged vis-a-vis President Carter.

6. If the Commission is concerned that it should not grant an open-ended stay, we suggest that a stay be granted for a period of one week from today, to enable the Court of Appeals to determine whether the stay should be continued thereafter if the merits have not been resolved. This would enable the Court of Appeals

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* *See Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

to consider both the case on the merits and the stay request in a more orderly fashion.

Respectfully submitted,

CBS INC.
By

/s/ Ralph E. Goldberg
RALPH E. GOLDBERG
51 W. 52 Street
New York, New York 10019

/s/ Joseph DeFranco
JOSEPH DEFRANCO
1800 M Street, N.W.
Washington, D.C. 20036

/s/ Mark W. Johnson
MARK W. JOHNSON
1800 M Street, N.W.
Washington, D.C. 20036

Its Attorneys

Of Counsel

Wilmer & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

November 26, 1979

[Certificate of Service Omitted in Printing]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 79-772

15192

In re Complaint of

Carter-Mondale Presidential Committee, Inc.

against

The ABC, CBS & NBC Television Networks.

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1979;

Released: November 26, 1979

By the Commission: Commissioners Lee and Washburn concurring; Commissioner Jones absent.

1. The Commission has before it petitions for reconsideration and stay of its *Memorandum Opinion and Order*, FCC 79-750, released on November 21, 1979, filed by CBS, ABC, and NBC, and various responsive pleadings. Because of the importance of this matter and the issues presented, the Commission has scheduled a special meeting for November 28, 1979, and intends to adopt a decision at that time. Accordingly, we *sua sponte* extend the date for compliance with the requirement set forth in paragraph 50 of the Order released November 21, 1979. Each network is instructed to advise the Commission on or before 5:30 PM, November 29, 1979, as to how it intends to fulfill its Section 312(a)(7) obligations.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Political Broadcasting Complaint of the
Carter-Mondale Presidential Committee, Inc.

PETITION FOR RECONSIDERATION AND COMMENTS IN SUPPORT OF MOTIONS FOR STAY

The National Association of Broadcasters (hereinafter NAB),[1] a party to this proceeding,[2] hereby submits its Petition for Reconsideration and Comments in Support of Motions for Stay, filed by the three networks in the above-captioned proceeding. The three networks have also filed petitions for reconsideration.

NAB, having reviewed the Commission's Memorandum Opinion and Order (FCC 79-750, —— FCC 2d —— (1979) in the above-captioned proceeding, agrees with petitioners-movants that the Commission's decision (1) sets forth a far-reaching set of new policies—policies which remove substantial discretion from broadcast licensees and (2) establishes a dangerous system of gov-

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[1] NAB is a nonprofit incorporated association of radio and television broadcast stations and networks. As of November 20, 1979, NAB's membership included 616 television broadcast stations, 4,609 radio broadcast stations and all the major commercial broadcast networks.

[2] NAB filed Comments on November 8, 1979, urging the Commission to find that the refusal by the three networks to sell the Carter-Mondale Presidential Committee a half-hour of prime time is neither unreasonable under Section 312(a)(7) of the Communications Act nor an abuse of the journalistic discretion properly vested in their stations as licensees. NAB submitted these Comments, as an *amicus curiae*, to underscore the interest of broadcast licensees in this proceeding.

ernmental second-guessing of broadcasters' good faith judgments as to reasonable access. It is NAB's position that this new approach to political broadcasting was not contemplated by Congress when it enacted Section 312 (a) (7) of the Communications Act and that this new approach is, in fact, in direct conflict with that statutory provision. Moreover, the Commission's decision underscores the conflict of this statute with the First Amendment interest in insulating from governmental second-guessing broadcasters' discretion as to programming.

In its Memorandum Opinion and Order, finding that the networks had acted unreasonably under Section 312 (a) (7), the Commission articulated a new policy—one which based a determination of "reasonable access" on the "needs" of particular Federal candidates. Under this "customer is *always* right" theory,[3] a broadcaster would be unable to exercise the discretion afforded licensees by Congress. This discretion, enjoyed by broadcasters prior to November 21, 1979, the release date of the Commission's action, afforded networks and broadcasters the opportunity to gauge the needs of all candidates running for Federal office and to make decisions accordingly. Now, absent stay and prompt Commission reconsideration, that discretion will have vanished.

As an association of thousands of radio and television stations, NAB must emphasize here the detrimental

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[3] Here, the "customers" are political candidates for Federal office, and the "sellers" are stations which are licensed by a Federal agency which in turn depends on Federal officeholders for all its funding and jurisdiction. The stations under this scheme of enlarged governmental control lose their role as editors. The Supreme Court, in the landmark *CBS* v. *DNC* case, 412 U.S. 94 (1973), commented that "[r]egimenting broadcasters is too radical a therapy" and emphasized the importance of providing licensees with the utmost discretion: "For better or worse, editing is what editors are for: and editing is selection and choice of material." *Id.* at 124.

effect of the Commission's decision on individual stations, not just the networks. These adverse effects, measured in terms of restricted First Amendment rights and emasculated journalistic and programming discretion, will be imposed on individual station licensees. Indeed, a reading of the Commission's Opinion makes it quite clear that the agency did intend for its decision to affect individual stations, ignoring apparently the sharp constriction of stations' journalistic discretion.

The Commission interprets Section 312(a)(7) as applying to "the combination of licensees in a network" and asserts that networks act as "agents" for their affiliated stations. This interpretation apparently would bind every affiliated station to the broadcast of network-carried political candidates granted "reasonable access."[4] Of course, licensees have not abdicated their programming decisions to the networks. The Commission's view is contradicted by the actual economic and legal relationship between networks and affiliates and by the "public interest" standard of the Communications Act and the Commission's own rules requiring licensees to make programming judgments free of compulsion from any outside individual or entity. That is, in attempting to establish jurisdiction over the networks, the Commission has articulated a rationale that is inconsistent with well-established law and policy designed to keep programming decisions in the hands of licensees. The Commission implies a system of mandatory station clearance of political broadcast time sold by the networks. This view, of course, ignores the judgments of the individual licensees as to

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[4] The Commission's Opinion states that "networks sell time as a unit on behalf of their licensees to presidential candidates. In view of the fact that network licensees hold themselves out as a unit for economic purposes, they have no reasonable basis for complaining when subjected to the enforcement of Section 312 (a)(7)." (Memorandum Opinion and Order at 10.)

their weighing of several relevant factors in affording political broadcast time.

Not only would the public interest be disserved by mandatory local station carriage, but individual licensees would be deprived of the full due process of law that Section 312(a)(7) contemplates. In addition to this general denial of due process, the Commission's enforcement of Section 312(a)(7), through the networks, ignores the differing circumstances that are likely to exist at individual stations, such as the amounts of political time being sold by these stations locally to the same and other candidates.

Commissioner Robert E. Lee was right when he said, "the FCC is establishing a new principle of conditional candidacy." This decision means that henceforth every licensee must accept the claim of any person that he or she is about to become a candidate for Federal office. In reliance upon that claim, the Commission would require each licensee to sell at least thirty minutes of time per day to that individual. As a practical matter, the Commission's ruling in this matter would place every broadcast licensee under an obligation at direct variance with its journalistic responsibilities, in effect substituting the whim of any person with funds to purchase time for the thoughtful, balanced journalistic decision-making of the licensee.

We call the Commission's attention to the problems which may now confront a licensee in any major community. One example is that of Station WCCO(AM), in Minneapolis, Minnesota. Analyzing the station's situation under the most conservative methodology, there are a total of nine Congressional districts in the station's coverage area. In six of them, WCCO can anticipate a minimum of four bona fide primary candidates from each of the two major parties, for a total of 24 possible claimants for time. In the remaining three Congressional districts,

which are predominantly urban, the station expects a minimum of seven candidates for a separate total of 21. Because WCCO also covers part of Wisconsin, it could also be obligated under this decision to provide time to a minimum of four possible candidates for the U.S. Senate this year. Conservative calculations add 13 candidates for the Presidency, who may soon compete in the Wisconsin Presidential primaries. Thus, at least 62 persons might demand that a single licensee sell them substantial blocks of time. In some parts of the United States, notably in the tri-State New York City market, this problem would enlarge by geometric proportions.

WHEREFORE, for these reasons and those advanced by the other petitioners-movants, the Commission should reconsider its Order in this proceeding and deny the complaint. At the very least, the Commission should indicate clearly (1) that "reasonable access" will not be based solely on the "needs" of individual candidates, and (2) that individual licensees are not bound by the discretionary judgment of any network to carry a Presidential candidate's program.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

ERWIN G. KRASNOW

Stephen E. Nevas
First Amendment Adviser

BARRY D. UMANSKY
Counsel

November 26, 1979

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Complaint of

Carter-Mondale Presidential Committee, Inc.

against

The ABC, CBS & NBC Television Networks.

FURTHER STATEMENT OF CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC.

This brief statement is being filed in response to the Commission's Memorandum Opinion and Order of November 26, 1979 extending the date for compliance with the Commission's prior Order in this matter to 5:30 PM, November 29, 1979.

Although described by the Commission as a *sua sponte* action, the Commission's Order in effect grants the stays requested by the networks for a three-day period in a case where time is of the essence. For the reasons expressed in our Novmber 23rd Opposition to Stay Requests (which have become even more critical at this point), any further stay will as a practical matter amount to a denial of the relief requested.*

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* Subsequent to the Commission's decision on November 20 and again after release of the Commission's Order on November 21, the Committee sought to negotiate with the networks for time on one of the requested evenings (December 4-7). The networks refused to negotiate at all. The Committee sought this time to coincide with the President's scheduled announcement of his candidacy on December 4. In addition, the Committee, of necessity, has now scheduled the more than 2,000 small-donor fundraising parties (*See*, Affidavit of Gerald M. Rafshoon attached to the Committee's Opposition to Petitions for Stay, at 6-7, ¶ 12), for December 4, the date of the President's announcement. Obviously, given its original

At this point, there is simply no reason why the networks should not provide the Committee with availabilities and demonstrate when they would comply with the Commission's order.* Particularly in view of the networks' absolute refusals to engage in any substantive discussions with the candidate's Committee to attempt to resolve this matter, denial of the reconsideration and stay requests is the only appropriate course of action for the Commission.

Notwithstanding the Commission's suggestion that the parties attempt to reconcile their differences (November 21 Order, p. 23 N. 34), the situation remains the same as before the Commission acted. The networks have simply maintained the positions which forced the Committee to file its Complaint one month ago. All three refuse to sell the requested half-hour time period. *NBC* refused to sell any time whatsoever.

CBS' counter-offer of two five-minute programs, one on December 8 at 10:55 p.m. and the other at an unspecified daytime period is completely unresponsive. This counter-offer is for a different program length and outside the days (December 4-7) and time period (8:00 p.m.-10:30 p.m.) requested by the Committee.

After our Complaint was filed, *ABC* represented to the Commission that it will make time available beginning with the first week of January, 1980. However, it has not offered to sell any time to the Committee, nor has it

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intent to have the parties coincide with the television program in question, the Committee's preference for airing of the show is now December 4. This date would still leave six days for the networks to seek judicial review.

* Nor can the Commission, as NBC suggests, permit a statement of refusal to comply to be deemed compliance with the Commission's instructions. See *NBC Request for Reconsideration*, p. 2.

specified the *length* of time it might be selling in January.*

The Commission's reconciliation efforts having been rejected by the networks, it is therefore encumbent on the Commission to act promptly and effectively to insure the integrity of its November 21st Order.

Respectfully submitted,

/s/ Timothy G. Smith
TIMOTHY G. SMITH
General Counsel
Carter-Mondale Presidential
Committee, Inc.
1413 K Street, N.W.
Washington, D.C. 20005

Of Counsel:

John D. Lane
Ramsey L. Woodworth
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold K. McCombs
1822 Jefferson Place, N.W.
Washington, D.C. 20036

November 27, 1979

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* As far as the candidate's Committee is concerned, our only communication from ABC is its October 23rd flat refusal to sell any time.

LETTER FROM NATIONAL BROADCASTING COMPANY, INC.

NBC

National Broadcasting
Company, Inc.

1800 K Street, N.W.
Washington, D.C. 20006
202-833-3600

Howard Monderer
Law Department
Vice President, Law
Washington

November 28, 1979

Honorable William J. Tricarico
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Complaint of the Carter-Mondale
Presidential Committee, Inc.,
FCC 79-750.

Dear Mr. Tricarico:

In our letter to you of November 23, 1979, seeking reconsideration of the Commission's Memorandum Opinion and Order released November 21, 1979, there was a typographical error on page 4, footnote **, line 4. The footnote should have read as follows:

> "The NBC Television Network has, of course, provided the public with extensive coverage of and information about President. Since January 1, 1979, President Carter has made approximately 37 major appearances (speeches, messages, news conferences, interviews, etc.) on NBC. In addition, President Carter's picture or voice has appeared in approxi-

mately 115 reports in each of the (NBC Nightly News" and "NBC Today" programs since the beginning of this year."

We regret the error.

Sincerely yours,

/s/ Howard Monderer
HOWARD MONDERER

[List of Recipients Omitted in Printing]

FEDERAL COMMUNICATIONS COMMISSION

SPECIAL OPEN MEETING [*]

November 28, 1979

Agenda: Complaints & Compliance Item No. 1

ABC, CBS and NBC petitions for reconsideration and stay of decision in re Carter-Mondale Presidential Committee.

The above-entitled Item came on for discussion pursuant to notice, with Chairman, Commissioner Charles D. Ferris presiding, at 1919 M Street, N.W., Washington, D.C., in Room 856, at 2:04 p.m.

APPEARANCES:

Commissioner James M. Quello
Commissioner Robert E. Lee
Commissioner Abbott M. Washburn
Commissioner Joseph R. Fogarty
Commissioner Tyrone Brown
Commissioner Anne P. Jones

Also Present:

Richard J. Shiben
Lisa Margolis
Robert R. Bruce

[* This transcript was included in the Appendix filed in this case in court of appeals. Counsel for Respondents Federal Communication commission and United States of America have consented to its inclusion in this Joint Appendix, without prejudice to the Commission's general position, which it has taken in other cases, that the comments of Commissioners at open Commission meetings are not a part of the administrative record.]

PROCEEDINGS

(2:04 p.m.)

CHAIRMAN FERRIS: The meeting will come to order. The item of consideration this afternoon is the petitions by ABC, CBS and NBC for Reconsideration and Stay of the Decision in re. the Carter-Mondale Presidential Committee. Dick?

MR. SHIBEN: Mr. Chairman, Lisa Margolis has been working on this matter I think morning, noon, afternoon and night for the last four or five days. And I would like her to present it for the Broadcast Bureau.

CHAIRMAN FERRIS: Ms. Margolis?

MS. MARGOLIS: The Commission has received three petitions for Reconsideration and for Stay of its November 21st ruling from the ABC, NBC and CBS television networks. The Commission's order found that all three networks had acted unreasonably in refusing to sell time to President Carter in his capacity as a candidate for the Democratic nomination, and that they had thus failed to comply with Section 312 A7, the reasonable access of the Communications Act.

Specifically, the Commission found that the reasons that the networks gave for refusing to sell the time were deficient and that the networks had failed to give sufficient consideration to the desires of the candidate as to the best method of pursuing his media campaign. The three networks now argue that their decisions were reasonable, that they did in fact consider the needs of the candidate, and that reconsideration should be granted.

ABC and CBS contend that the Commission erred in focusing on the desires of the individual candidate. The petitions for stay allege that all three networks will seek judicial review of—will seek judicial review—in the event that reconsideration is denied. They also allege that programming disruptions may result in the absence of the stay.

The Carter-Mondale Presidential Committee alleges that it will be irrepairably harmed in the event that a stay is granted.

The Bureau recommends—the staff, rather, recommends—that all of the petitions be denied. The proposed memorandum and order clarify and reaffirm the Commission's original order. It clarifies the order as to the manner in which the Commission expects licensees to evaluate each individual request for time with which it is presented.

Also to the petitions for stay, we recommend that they also be denied. The networks have failed to satisfy the traditional criteria employed in determining whether a stay should be granted. Among other things, they have failed to show that they will be irrepairably harmed in the absence of a stay. Moreover, the Committee has made a substantial showing that it will be harmed in the event that a stay is granted.

Accordingly, we recommend that reconsideration be denied and that the Commission order the networks to inform it as to how they plan to fulfill their obligations to provide reasonable access to the candidate by the close of business November 29th, 1979.

CHAIRMAN FERRIS: Discussion?

(Pause)

CHAIRMAN FERRIS: The question? I would like to say one thing on an unrelated—I don't think it is appropriate normally to comment on extraneous reports. But there was an unfortunate story that appeared in a newspaper today, which I think—one thing one can question I think. A great contribution to societies, someone once said, if you lined up all the lawyers and shot them. I suppose one could say that one could line up all the headline writers and shoot them. But I think the story itself called into question the nature of the collegial body and any discussions between Commissioners on the merits of a particular item.

This one here mentioned certainly Commissioner Brown and my discussions on how this order or the record here and how an order one way or the other could be constructed. I think—I just think it is unfortunate that if anyone could interpret Commissioner Brown's contribution in this case as other than one that has been totally intellectually honest and very positive.

I must say that Commissioner Brown is probably one of the most intellectually honest persons I have ever met in my life, as well as probably one of the finest legal minds. And any contribution that he makes to any of our recommendations here is on the record and I think improves. And I think his contributions during this entire matter have been totally instructive, and I think have improved any of the items before us, in particular this one here.

So, as I said, I don't like commenting on outside reports from extraneous matters, but I do think, especially when one—a story could be interpreted—all of Commissioner's Brown contribution on this and any other matter. I think I just want to on my own raise that question and clarify that.

Now any discussion on the merits of the case?

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER BROWN: I certainly appreciate your comment. I am not concerned about what appears in the newspapers about this case. I am concerned about the decision that the Commission issues and that that decision be as strong as we can possibly make it, particularly in light of the importance of this case. And it is important, and the precedential value that it may have.

For that purpose, what appears in our decision for purposes of review by reviewing courts, if any appeals are taken, and for purposes of guidance of broadcasters

as they move into this and other election seasons is the more important consideration.

In that connection I want to emphasize that I feel that the staff, General Counsel's Office, and the Broadcast Bureau on this matter, since the issuance of our original order last week, and in light of the Petitions for Reconsideration that the Commission has received, have worked very, very hard, very diligently, and very skillfully to assure that any doubts about the Commission's intent in its original order have been clarified.

I must say frankly that, although I supported the original order, on reviewing the petitions for consideration I thought that there was a risk extant for our order to be misinterpreted. My office and I have been working with the staff of the Bureau to clarify our order to avoid those kinds of misinterpretations or misconceptions.

For me, this case on its facts has always been an easy case. A problem in a delicate area that involves balancing of First Amendment considerations, broadcasters, and rights of access for candidates is that the Commission needs to be extremely careful to be sure that its order doesn't go and that we have provided as much guidance to the licensees and to candidates that we possibly can.

I feel that with the clarification that is being issued today we have done just that. Further in that connection, I would like to point out that for me one of the very important parts of this case, one of the very important facts of this case, is that this was a first request—a first request by a candidate for broadcast time.

The Commission, majority of the Commission, had decided that the campaign for the Democratic nomination for President is actively underway today. Having made that decision, I simply fail to see how the Commission could then take the position that although the campaign is actively underway the broadcaster, here the networks, can turn down a very early—in the sense of

giving the networks plenty of time to adjust their schedules, if that is necessary—very timely, first request for a segment of broadcast time.

In all of these cases we are going to have to—the broadcaster is going to have to initially—balance factors that weigh in favor of granting accesses requested by the candidate, and factors that mitigate against it.

The circumstances of this case, considering that this is a first request and considering also that that request was made more than two months prior to the time that was sought, I simply fail to see how the Commission could rule otherwise than that a failure to be more responsive did not comport with the requirements of the statute.

COMMISSIONER WASHBURN: Can I ask the Commissioner a question? What is the magic of this first request? I notice in the document as rewritten the second request doesn't get as much attention, or the broadcaster said he doesn't have to pay as much attention to the second request. I would think that should get even more attention under your rationale, because that shows that the battle is going on even stronger. Why does the second request get less attention, and what is the magic of the first request?

COMMISSIONER BROWN: The magic of the first request, in my judgment, is that among the factors the broadcaster has every right to consider when a candidate requests time is how much time has that particular candidate received from that particular broadcaster in the past? How recently have requests for time been made and granted?

There is nothing on that part of the scale in favor of the broadcaster if the reasonable access period has attached in terms of Section 312 A7, and yet no time has been granted by the broadcaster. So that is the magic that I attach to that particular. There is simply no element on the side of the broadcaster as far as having received repetitive requests from a particular candidate.

CHAIRMAN FERRIS: I think the magic of the second request as well if the first request is honored, which demonstrated that there wasn't a—

COMMISSIONER BROWN: That is correct.

CHAIRMAN FERRIS: —Pavlovian response to requests generally.

COMMISSIONER WASHBURN: Say that again?

CHAIRMAN FERRIS: Well, the fact that you had a second request after you had time the first time demonstrated that at least you got time the first time and that there wasn't an attitude on the part of the network or the broadcaster from the standpoint of having a total rigidity to these requests and a policy of total denial.

So I think—

COMMISSIONER WASHBURN: So they don't have to pay as much attention to the second request.

CHAIRMAN FERRIS: Of course they do. Oh, I think they pay—but the values in weighing, the process of weighing, is an ad hoc one in each case. And I think the fact that the first request was honored and there was time I think is part of the new chemistry in your evaluation of the second request.

COMMISSIONER BROWN: The broadcaster, Commissioner Washburn, I would hope certainly, and certainly our intent, would pay attention to every request. The question is whether or not a negative response to a particular request be considered reasonable in the light of all the factors. And one factor that does not weigh in the favor of the broadcaster with respect to the first request is that he has had repetitive requests from a particular candidate.

Here there have been no repetitive requests for time. It is as simple as that.

COMMISSIONER LEE: I don't believe that I disagree with Commissioner Brown with respect to having made the decision that the campaign is one. The rest may be easy. I just question our expertise to decide that

we are the experts as to when a campaign is on for purposes of triggering the Act.

I think that probably we haven't heard the last of this, and I was wondering could the networks sell less time than one-half hour under this decision now? Suppose they come back and say 15 minutes. Is 30 minutes now the magic number?

MR. BRUCE: The response is up to the networks. We have ruled on their—on their offer, which we found to be unreasonable.

COMMISSIONER LEE: Well, could they offer time on dates any than the December 4th—was it 4th, 5th, 6th, or 7th?

MR. BRUCE: I think that that is—you know, again I am not trying to be evasive about it, but I that our action is limited to finding that their offer as made was unreasonable. And I don't think the Commission is in the position of prescribing precisely what action the networks will take in response to that action.

COMMISSIONER LEE: Do you consider that this decision is an extension of 312 A7 or—

MR. BRUCE: No, I think it is the first attempt to try to—to develop a way of applying this statute in a fair and even-handed manner, balancing the competing First Amendment-related concerns of broadcasters and candidates and the public.

And I think that to the extent that this decision has required us to wrestle with some of the difficult issues we have moved forward in trying to give some meaning to statutory obligations that Congress imposed. And I think obviously it appears that this action will be subject to judicial review and will have further clarification of the state of the law in this area. And I think that is to be very much desired by the Commission in trying to carry out its obligations that have been imposed by the Congress.

COMMISSIONER LEE: Under this decision could the Committee request a half an hour on all three networks in prime time?

MR. BRUCE: Well, I think that the nature of the request by the complainant was for time on one of the networks.

I think—I think under this decision they have made requests of each of the networks, but the record of this proceeding suggests that they do not want to buy time on all of the networks, only one one.

COMMISSIONER LEE: If one network is decided on, that triggers 315 only with respect to that one network.

MR. BRUCE: That is correct.

COMMISSIONER LEE: So that the ultimate action triggering 315 is really a Government decision. We have said do it, and the effect is to hurt the network unless time is requested on the other networks by other candidates.

Mr. BRUCE: Well, I don't—I don't know that it—the action can be characterized as hurting the networks. I think that obviously candidates have the option of making requests of other networks as well.

COMMISSIONER LEE: The opinion, assuming that one-half hour is required, the option is then with the Committee as to who is the Lucky Louis of the three networks.

MR. BRUCE: Well, I think it takes two to tango in this area and—

COMMISSIONER LEE: It might take three in this case.

MR. BRUCE: Well—

COMMISSIONER LEE: I don't think I have any further comment. I will have a dissent.

COMMISSIONER JONES: I would like to just comment on something that Commissioner Brown said about, you know, the first request has nothing to weigh in on

the broadcaster's side. I would like to suggest that you have to weigh in on the broadcaster's side the existence of many other candidates and the fact that Section 315 will be triggered.

I don't think we can sit here and say that they have a request simply by one—well, "candidate," and I am using that word loosely. because I think that is another very important question that is present in this decision, but that there is a qualifying candidate who has made this request.

But in any event we can't say simply that there is—they have been—approached by one candidate. They are faced with the fact that, if they sell time to this one candidate, there are—I don't know what the number was on the item, but let's say—let's be very conservative and say—at least 12 other people who will then have the right to equal time, which I find something that if I were a broadcaster I would certainly weigh in, especially considering the fact that we might find that the reasonable time for them is in a time frame which would completely disrupt broadcasting for the entire month of December or—

COMMISSIONER BROWN: We are not—we don't have that case before us. If we did—

COMMISSIONER JONES: I think we have the case.

COMMISSIONER BROWN: If—

COMMISSIONER JONES: We have the case. We don't have the—you speak of the actuality of requests by candidates. I think that is carrying it too far. I think the fact that they have the right to request is something that a businessman must consider.

COMMISSIONER BROWN: But a businessman faced with that difficulty and this Commission faced with that difficulty is not powerless to do anything about it. If as a result of the action that we take today, or some future action, broadcasters are faced with a real multiplicity of actual requests for broadcast time, paid politi-

cal time, the broadcaster has every right—and it seems to me acting as a reasonable licensee or network—to take those requests in consideration in deciding how it will respond to the request for reasonable access. And it seems to me that this Commission also must take that fact into consideration in reviewing the broadcaster's action.

But to speculate at this point that, based on the right of access the networks are going to be faced with a host of—315 requests—and then try to deal with that situation now, before we have faced it, it just seems to me gets us into a morass.

COMMISSIONER JONES: Well, I think we have the fact of the right attaching. And then we, as a Commission, are speculating that not many requests will come in. I think we are the ones who are engaging in speculation, which I find—

MR. BRUCE: Well, I think Commissioner Brown has responded to your question the way I would have, which is the record before us does not indicate that there are likely to be multiple requests. Indeed the record—

COMMISSIONER JONES: You don't know that, right?

MR. BRUCE: The record is devoid of any—

COMMISSIONER JONES: Of—

MR. BRUCE: —any indication by—

COMMISSIONER JONES: —other candidates aren't in there.

MR. BRUCE: —the networks that there are contingent requests for time if the Carter complaint is granted.

COMMISSIONER JONES: But the right does, you would agree that—

MR. BRUCE: That is right, but I think that this decision holds that the theoretical right is not sufficient, and we should be looking at the record to demonstrate whether it is likely that all—all 11—candidates will ask for time on all networks. What—

COMMISSIONER JONES: I think it is 122 candidates or something.

MR. BRUCE: Well, there are I think 11 candidates in the major parties.

COMMISSIONER BROWN: I would be willing to say that this opinion would not apply to the situation in which a single network is faced with requests from 112 candidates for time. I don't think I would be going too far out on a limb.

COMMISSIONER JONES: Well, no, it applies. It applies because it applies once they sell to one. Then the right attaches. What you are saying you might not make them have all 122 on—

COMMISSIONER BROWN: I probably would not—

COMMISSIONER JONES: —for a half hour in December.

COMMISSIONER BROWN: I probably would not reach the same result. That is correct.

CHAIRMAN FERRIS: I think the question of what is reasonable action on the part of the networks is an ad hoc determination that you make. If the network that granted time in this was petitioned by 122 and they were unable to accommodate the 122 or the 3rd and the 4th and the 5th in the month of December and it came back to us, we would have to make a determination as to whether they were reasonable in each instance of saying yes or no.

COMMISSIONER JONES: I am really suggesting that on the side of the broadcasters we have to weigh in the fact that a right of equal opportunity attaches to other candidates, the right. So I think there is something to weight, and I would not in my judgment think a request for time is simply the right, is something that should be weighed on the broadcasters.

And I am back where I was the first time, and I am not going to beat a dead horse you will be happy to know.

CHAIRMAN FERRIS: No. I think that right is weighed fully in the order that has been represented to us. I think that is a fact that is considered.

COMMISSIONER BROWN: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER BROWN: I just—to mention specifically some of the concerns that I had about the order, based on the petitions for reconsideration. The arguments were made that the Commission in its original order had given total control to candidates to decide whether and when and how much time they would receive over the air, I don't read our original order that way, and I think that to the extent that some might have read it that way, it certainly is clear from the clarification in today's order that the Commission had no such intent.

I think it is also clear from today's order—and again we did not have this intent originally—that broadcasters are required to take into account the subjective, political position of candidates, one candidate, for example, feeling that he or she may have just lost in New Hampshire or is falling in the polls and therefore that candidate must have time tomorrow to address the national audience, that kind of thing.

This order makes it clear that we are not asking broadcasters to take those kinds of considerations as relevant for purposes of reasonable access. What we do require all broadcasters to do is to look at each request on the basis of the particular request that is made and not to make a blanket—to take a blanket approach to the question of granting access to candidates for political office.

I think on that basis that the order that the Commission has issues in this matter will make it possible for candidates and broadcasters to live with Section 312 A7, and both taking honest and bona fide approaches to make it work, that the statute will work.

The American people will benefit from that.

COMMISSIONER QUELLO: I think we are going to have an opportunity to see whether this really works or not, but I think Commissioner Jones has a real point. You are going to trigger other requests. However, if you get to the point where this gets to be unfeasible or unworkable, why finally maybe they will get around to my original position for the last three years, and that is that Section 312 A7 should be abolished. But that is going to be a legislative move, not our move.

It is still on the books. It requires more access as opposed to less access. And I—I don't see a basis here for reconsideration.

CHAIRMAN FERRIS: Commissioner Washburn

COMMISSIONER WASHBURN: Mr. Chairman, paragraph 43, page 17, the summary section, says "we believe that Section 312 A7 can not be implemented reasonably if either of the interests of broadcasters or candidates are allowed to become pre-eminent, for if we accord controlling weight to candidates' needs and interests, there is a serious potential for impinging unduly on broadcasters' discretion. At the same time if we interpret the statute so as to afford broadcasters essentially unlimited discretion with respect to access issues, needs of candidates and of the electorate may be given short shrift." And elsewhere he talks about this delicate balance between these two interests.

And yet, as you read the order, it does put a dominant amount of attention and interest upon the needs of the candidate. It is written that way. It is the needs of the candidates emerge as the controlling element here. I don't think you can read this any other way.

And this is contrary to our 1978 analysis of 312 A7, in which we said that there are three criteria that broadcasters should consider. One is the timing and unavailability of particular classes of time. Two is the multiplicity of candidates. Three is the needs of candidates.

And what this order does is elevate that number three to the overriding criterion here. And this is a very unfortunate thing, I believe. It destroys the balance that is so rightly described here in the summary that I—paragraph 43 that I—read.

I think of all the legal problems involved here the most troublesome one by far is this question of the FCC interfering with the discretion of the broadcasters and substituting its judgment for theirs. And there is a whole groups of paragraphs here, paragraph 31 through 35 on pages 12 and 13, which do exactly that. They tell the broadcasters how to consider the individual requests of candidates. They spell it out, so that the Commission's judgment is substituted for the good faith judgment of the broadcasters. And I think this is very dangerous and unnecessary and unfortunate, but this is the consequence of this order. And it is going to rise to haunt the Commission and the public in years to come in future campaigns, because you will have arguments of when, quote, "a campaign is in full swing." And you will have court cases around this. You will have candidates coming in in mid-summer and quoting this document to the Commission and saying: "You said it was the candidates' needs that were uppermost. We say the campaign is in full swing. I am a candidate. I have six other people that are against me in the primaries. It is summer. The campaign is underway." Broadcasters will say: "It is summer. The campaign is not underway. The campaign will not be underway until next January." But they will have to give that candidate the time.

I think the thing is totally wrong and unfortunate.

CHAIRMAN FERRIS: I just want to say that I think it's an extraordinarily well written order. It's a great improvement, I think, over the original order. I think it demonstrates that the petitions for reconsideration were considered; they were—and the points of view were considered. And I think we—the order that is pre-

sented here demonstrates the honesty of those considerations and meeting them on the merits.

I just want to say that I think it's a job extraordinarily well done by all of you.

COMMISSIONER WASHBURN: Could I ask a question of the staff, or, indeed, of my fellow Commissioners?

What would you have said to Mr. Connally, if he had come in July and said, I have x number of opponents in the race. I want time.

MR. BRUCE: I think what the—

COMMISSIONER WASHBURN: And this document was in existence?

MR. BRUCE: Commissioner, I didn't want to respond at length to your comments because I would respectfully submit that the document does not have the effect that you suggest.

But I think that it does not clearly make the candidates' appraisal of whether the campaign is under way controlling. I think that's very clear. It was clear in the original order. I think it's clear on this order, on reconsideration.

I think that we treat the question of whether the campaign is under way as a question of whether 312 A 7 rights and obligations attach. And that is an area that is within the Commission's responsibility. It's a determination that was made in the original order on objection criteria and I think, certainly, what the order suggests is that making that independent appraisal, the Commission would take into account representations included in the candidate's complaint, or, indeed, the broadcaster's own view.

But I simply disagree with your reading of the order, that it makes that question of 312 A 7 obligations attaching one that is within the discretion of the candidate.

COMMISSIONER FOGARTY: Mr. Chairman?

CHAIRMAN FERRIS: Yes?

COMMISSIONER FOGARTY: This petition for reconsideration gave us an opportunity to tighten up the original order. And I want to specifically thank the General Counsel, Mr. Bruce, for his contribution, working with my office and making this a, I think, a far more cogent order than the original one, which we issued. And I fully support it.

COMMISSIONER WASHBURN: Going to what you said, Mr. General Counsel, paragraph 33 spells out what the broadcasters can't do in looking at candidates' needs. "We specifically eschew any intention of requiring broadcasters to make an assessment of individual candidate needs insofar as they solely relate to the candidate's subjective, personal, or immediate political desires.

We do not intend to place broadcasters in the position of evaluating the political importance or urgency of individual candidate needs in terms of particular candidate situation in a campaign, where he stands in the polls, or how he has fared in specific primaries.

Well, what can the broadcaster do? We have specifically noted that a broadcaster should not second guess the political wisdom or relative audience attracting effectiveness of longer versus shorter formats. In other words, the broadcaster can't second guess the wisdom of the candidate or the candidate's media expert. He simply has to take that.

Such judgments are best left to the discretion of the candidate and his media advisor. Moreover, we shall look with concern upon evidence that broadcasters have not demonstrated proper restraint in evaluating the candidate's requests."

And then they talk about how CBS didn't do this.

MR. BRUCE: Commissioner, the—

COMMISSIONER WASHBURN: I can't see how you can read that otherwise and just say the candidate just rolls over—the broadcaster just rolls over and takes what the candidate wants.

MR. BRUCE: The portion of the order that I think addresses the question of 312 A 7, Rights, Attaches, in paragraph 28, and not in the subsequent paragraphs. And I simply think it's clear there that the threshold question of whether 312 A 7 Rights Attaches to be made was made, and is to be made on the basis of the Commission's independent evaluation of the status of that public campaign. And taking into account what the broadcaster says and what the candidate says in his complaint.

And I think that read together and in context, these paragraphs address that the candidate's interest is not controlling. I think the portions of the order that you, yourself, read that indicated an awareness that a balancing is involved, I think do reflect the general thrust of the order.

I think it's clear that we have construed the statute in a way that provides broadcasters substantial leeway as to the amount and the timing of opportunities that are to be made. I think that that is implicit in the weighing factors that are taken into account.

The candidates' needs factor is simply one countervailing factor to interest that the broadcaster can weigh in deciding whether or not to be access requests.

And we have also, I think, from a procedural standpoint, dealt with this complaint in a way in which we are dealing with the broadcaster's own explanation of his reasons for acting on the complaint.

And I think that—that procedural approach to these cases, as well, reflects, I think, a real sensitivity on the Commission's part to not intruding itself into and substituting its own judgment for that of the broadcaster.

But the fundamental problem is, as long as there is a statute on—that the Congress has enacted that imposes reasonable access obligations, this Commisison has an obligation to enforce that statute. And there will be oc-

casions in which the Commission finds those obligations have not been fulfilled.

And when that happens, the—necessarily, because of the Congress decision in adopting that statute, the effect will be to override a judgment that the broadcaster has made. The Congress's intention was to provide some method of accountability to balance competing constitutionally effective interests here.

And the Congress apparently concluded that there was more than one First Amendment interest at stake, not merely the interest of maintaining the broadcaster's editorial independence, but also interest in encouraging political speech and in the interests of the public in being informed on important issues before the electorate.

MR. BRUCE: I'm glad that Commissioner Washburn quoted in full from paragraph 33. It's one of the sections that I asked be included in the opinion.

And I would—what I wonder is whether the Commissioner would be more satisfied if the Commission took the position of requiring broadcasters to make an assessment of individual candidate needs insofar as they relate to the candidate's subjective, personal, or immediate political desires. Is that the—is that what we should affirmatively require of broadcasters?

COMMISSIONER WASHBURN: Of course not.

MR. BRUCE: Then I was—I was wondering, then, what your concern with that point was.

COMMISSIONER WASHBURN: My concern—

MR. BRUCE: That's not language in which we're requiring broadcasters to do something. It's language which we're making it clear that we are not requiring broadcasters to do something.

COMMISSIONER WASHBURN: Those two—the whole thrust of those paragraphs on those two pages are—I don't see how they can be read by any impartial person except to say that we're elevating the needs of the candidate to be the overriding element here.

MR. BRUCE: Commissioner, I think the purpose is to assure that those needs, not are elevated, but they are not ignored.

I would state it in those terms. And I think we are trying to achieve a balance. Whether or not this approach that we've formulated achieves that balance, I think it's a question that will be resolved on review by the courts.

But we simply have a responsibility under the statute to balance competing interests, and I think this reflects the Commission's best effort to interpret that statute, to serve these competing, important interests.

COMMISSIONER WASHBURN: I have one other question and then I'll subside.

Page 34—paragraph 34 on page 13, in the middle of that paragraph reads, "For example, a candidate might request an opportunity to discuss a comples set of issues important to the electorate, which he believes cannot be accomplished through spot announcements on short program requests. In our view, Section 312 A 7's goal of encouraging electorate informing discussion requires a broadcaster to take into account this aspect of the individual candidate's request."

Well how does that square with Section 315, which forbids broadcasters to examine content of political broadcasts?

MR. BRUCE: I don't think—

COMMISSIONER JONES: When—go ahead.

MR. BRUCE: Well, I just think I will comment and say that I don't think that contemplates that the broadcaster is to conduct any sort of a review of the content of a broadcast.

What we're simply talking about is that they take into account some of the objective indicia of the request, such as the fact that a candidate says he wants to make a sustained exposition of views.

It doesn't say that the candidate—the candidate's desires are to be honored in that case. It just says that, in that limited respect, the broadcasters offer should be reasonably related as possible to the nature of the request.

And consider it in the overall context—and you have to add this caveat—fo weighing what the overall consequences are of grant of that major block of time.

If it turns out that an opportunity for a sustained exposition is requested by a candidate but there is the likelihood of competing other requests for time, the broadcaster can take that into account in denying that opportunity for sustained time.

So I—I think that these are consistent points. And I think they are set out in full in the order. And I think the order really has to be examined in its entirety and—because I think it does reflect an attempt to deal with some very difficult problems.

COMMISSIONER JONES: You would not find that inconsistent, that idea of, you know, the long block of time with some competing requests? You would not find that inconsistent with the statement in 33 that broadcasters should not second guess the wisdom or relative audience attracting effectiveness of longer versus shorter format?

MR. BRUCE: I'm sure what that—I don't think that's inconsistent, Commissioner, in the sense that that latter comment referred to, I think, a concern that a candidate might—that a broadcaster might get itself in a position, as indeed, one of the networks did in this case, of suggesting that a candidate was unwise in wanting a half hour spot—

COMMISSIONER JONES: And youmake that clear in the footnote. But the statement in the paragraph is pretty sweeping.

MR. BRUCE: Well I think that the footnote is probably the necessary clarification. And the kind—the ex-

ample of that is the situation where broadcaster comes in and says—implies that the candidate is unwise, because, in fact, a five minute segment of time would attract 67 percent more viewers than a half hour slot. That strikes me as being a wholly irrelevant factor for the network to consider.

From the network's standpoint, it may be very significant; how many viewers are watching. From a candidate's standpoint, he may be less interested in the total number of viewers than he is in the number of people who are willing to stay with his exposition of ideas for a shorter period of time.

So we're simply saying that that kind of second guessing of a candidate's preference is not a relevant factor. And so we're simply trying to give some guidance as to how these requests should be dealt with. And I think that has to be dealt with with these other matters in the context of the whole order.

CHAIRMAN FERRIS: Further discussion. The question is on the adoption of the memorandum, opinion and order denying the petition for reconsideration by ABC, NBC, and CBS and the denial, as well, of their petition for stay of the original order. All in favor, say "Aye".

(Chorus of "Ayes")

CHAIRMAN FERRIS: Opposed, "No".

(Couple of "No's".)

CHAIRMAN FERRIS: The ayes have it. So ordered. Any further business?

MR. BRUCE: I'll have a separate statement that—to be issued with today's order.

COMMISSIONER WASHBURN: I'll have a separate statement to be issued with today's order.

COMMISSIONER LEE: I'll have a statement.

CHAIRMAN FERRIS: Any further statements?

I'll stand by the text of the order.

I believe you have some minor editorials that don't change any substance. I'm going to have the order out this afternoon, within an hour.

MR. BRUCE: Yes. I'm going to try to do that. And I've mentioned that fact to all the members.

CHAIRMAN FERRIS: That authority is greeted for those minor editorials.

The Commission is adjourned.

(Whereupon, the proceedings, as described above, were adjourned at 2:48 P.M.)

V

ORDERS OF THE UNITED STATES SUPREME COURT GRANTING PETITIONS FOR WRITS OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 80-207

CBS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

The case is consolidated with Nos. 80-213 and 80-214 and a total of one hour is allotted for oral argument.

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SUPREME COURT OF THE UNITED STATES

No. 80-213

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

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The case is consolidated with Nos. 80-207 and 80-214 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 80-214

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 3, 1980

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The case is consolidated with Nos. 80-207 and 80-213 and a total of one hour is allotted for oral argument.

Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS, INC.,
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NATIONAL BROADCASTING COMPANY, INC.,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

JOHN D. LANE
RAMSEY L. WOODWORTH
HEDRICK AND LANE
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 628-5923

Attorneys for Respondent Carter/Mondale Presidential Committee, Inc.

September 20, 1980

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of judicial review or otherwise abused its discretion in affirming the Federal Communications Commission's Orders implementing the "reasonable access" provisions of Section 312(a)(7) of the Communications Act in the case below.

2. Whether the FCC's interpretation and implementation of Section 312(a)(7) which was affirmed by the court of appeals contravenes the First Amendment.

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BRIEF FOR CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case is the culmination of requests made to each of the three national television networks by the Carter/Mondale Presidential Committee, Inc. (hereinafter "Committee") to purchase one-half hour of time on one of the networks for use by Jimmy Carter in connection with his formal announcement of candidacy for renomination. As was the case in the proceedings before the court of appeals, the Committee is submitting a brief for two reasons. First, a presidential candidate's right of access to television is directly at stake. Second, the arbitrary refusals by all three networks to respond meaningfully to its request constitute a direct threat to the efficacy of the Federal campaign system enacted by Congress in 1971. In submitting this brief, the Committee has concentrated on those points of legislative history and constitutional law which demonstrate that the FCC's orders and the court's opinion affirming these orders were clearly contemplated by the statutory scheme enacted by Congress and equally compelled by Constitutional and public policy considerations.

To avoid burdening the Court with a further detailed counterstatement of the case, the counterstatement contained in the Brief for the Federal Respondents in Opposition summarizing the proceedings below is adopted.

ARGUMENT

I. THE COURT OF APPEALS CAREFULLY PERFORMED ITS REVIEW FUNCTION IN AFFIRMING THE COMMISSION'S ORDERS.

The court of appeals correctly found that § 312(a)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(a)(7) embodies an affirmative, albeit limited, right of access for candidates for federal elective

office to advocate their candidacies by direct broadcast communication to the electorate. In affirming the Commission's orders, the court scrupulously reviewed the intent and purposes of Congress in enacting § 312(a)(7), as reflected both in the statute's plain meaning and legislative history, and the statute's application by the FCC to the conflicting and disputed factual assertions of the parties before it. Its unanimous judgment, with Circuit Judge Tamm concurring in Circuit Judge Bazelon's "fine opinion for the court" (Pet. App. 56a) in order to express his concern over "nonneutral government decision-making" in the political broadcasting area of the type which was not before the court,[1] reflects the most precise and careful type of judicial review of agency action that could be expected.

Further review by this Court is neither warranted nor necessary. An administrative agency's construction of its enabling statute is entitled to some deference. In this case, the FCC's conclusions as to its powers were carefully examined below. Moreover, the review of an agency's application of its mandate to the particular facts of a dispute is a matter which traditionally has been entrusted to the courts of appeals. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491 (1951). Only in the rare instance where the standards have been "misapprehended or grossly misapplied" is it necessary or appropriate for this Court to depart from its "usual rule of non-interference." See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966); and *Federal Maritime Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958). Such a rare instance is not presented in this case.

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[1] The majority shared these concerns and welcomed Judge Tamm's admonitions regarding the type of agency conduct that would be impermissible. Pet.App. 47a, fn. 117.

A. The Plain Wording and Legislative History of Section 312(a)(7) Show That Congress Created an Affirmative Right of Access For Candidates For Federal Elective Office.

In recounting the growth of political campaigns in our country through the 19th and 20th Centuries in which print, radio and television have played ever-increasing roles, the court of appeals summarized that we are now unquestionably in the "era of television campaigning" where "it would be hard to overestimate the importance of television to our political processes." (Pet. App. 12a) The ability of the networks to grant or deny access carries with it the power to profoundly influence the outcome of elections. It was against this backdrop that Title I of the Federal Election Campaign Act of 1971 (the Campaign Communications Reform Act) was properly viewed to be a long-sought and appropriate response to the recognized need for the television industry to play a more active and responsible role in the nation's political process.

Section 312(a)(7) of the Communications Act, mandating that candidates for federal elective office shall be accorded, *inter alia*, the opportunity to purchase "reasonable amounts of time for the use of a broadcasting station . . .", is one of the key features of this Title and charges the FCC with the responsibility for its enforcement. In accord with the Commission's interpretation of its duties, the court of appeals correctly held that it "*did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office." (Pet.App. 14a) (Emphasis in original) Given the plain language of § 312(a)(7), supported by a clear legislative history, no other conclusion was possible.

The Commission's general political broadcasting policies, which have evolved under the basic public interest

provisions of the Communications Act, impose only broad and largely discretionary service responsibilities to give coverage to political campaigns generally. These policies do not mandate (except for the contingent right of equal opportunities under § 315) the appearance of particular candidates. See *Farmers Educational Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). See also *Report and Order, Commission Policy In Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). In contrast, new § 312(a)(7) deals with the right of an individual federal "legally qualified candidate" to seek and obtain broadcast time to advocate "his candidacy." [2]

The court of appeals properly recognized that one of the indisputable purposes of the 1971 Reform Act (of which § 312(a)(7) is a key part), as reflected in its legislative history, is "to give candidates for public office *greater access* to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." [3] The petitioners place great emphasis on the other legislative purposes of the Reform Act (which are alleged to be inconsistent with the court of appeals' interpretation of Section 312(a)(7)) and would ignore this basic purpose which is most germain to the consideration of Section 312(a)(7). Moreover, they would ignore the simultaneously adopted "conforming amendment" to § 315 of the Communications

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[2] It was of course proper for Congress to make this distinction in view of its basic constitutional responsibilities over the federal electoral process.

[3] S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in [1972], U.S. Code Cong. & Ad. News 1773, 1774 (emphasis added). See also S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 1821; 117 Cong. Rec. 28792 (1971) (statement of Sen. Pastore).

Act to limit the "no obligation" language of Section 315 to that particular section of the statute.[4]

This reading of the statute, as the court of appeals further reasoned, is also supported by subsequent events in the Senate concerning the provision. In a 1973 hearing reviewing Section 312(a)(7), then FCC Chairman Dean Burch testified as to the Commission's understanding that the section imposes the *additional specific requirement* that reasonable access be afforded candidates for federal office. This understanding had been previously set forth in the Commission's 1972 *Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC2d 510, 537-38 (1972). The Congressional guidance he requested, if the Commission's construction was in error, was met only with Senator Pastore's response that what the FCC had done to date in light of the provision was reasonable. (Pet.App. 19a)[5]

As they did before the court of appeals, the networks place a great reliance on this Court's opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). This reliance

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[4] Clearly, as the court of appeals noted, "if § 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to § 315 would have been required." (Pet.App. 18a).

[5] At that time, CBS was very much aware of the new affirmative obligations imposed by the statute and was urging its repeal. Dr. Frank Stanton, testifying for CBS, stated:

> Section 312(a)(7) now requires that on pain of license revocation a broadcaster must make available to candidates for federal elective office reasonable amounts of paid time or reasonable access to free time.

Pet.App. 19a, citing *Hearings Before the Communications Subcommittee of the Senate Committee on Commerce*, 93rd Cong., 1st Sess., ser. 93-4 (1973), at 137, 190.

is completely misplaced for the current posture of this case is precisely the reverse of the situation in *CBS* v. *DNC* where this Court was compelled to intervene. The court of appeals' decision therein had found a rather broad right of access for the public at large to be inherent in the public interest standard of the Communications Act, notwithstanding the judgment of the FCC otherwise and the absence of any specific mandate from Congress. In this case, however, the court of appeals has simply affirmed the FCC's expert and reasonable interpretation of the clear congressional mandate of access expressed in § 312(a)(7). As Judge Bazelon wrote:

> . . . in the case before us, the deference to Congress and the Commission which the Court manifested in *CBS* v. *DNC* cuts in favor of the existence of a limited right of access. Here, the Commission uses a statutory provision to *support*, rather than *resist*, the imposition of a limited affirmative right of access. (Pet.App. 21a-22a, emphasis in original, footnote omitted)

There is no need for this Court to intervene only to duplicate and reaffirm the exhaustive review efforts of the court of appeals.

B. The Commission's Implementation of Section 312(a)(7) Was Reasonable and, as the Court of Appeals Found, is Supported By the Record.

Having agreed with the Commission that § 312(a)(7) did create a new affirmative right of access in favor of legally qualified candidates for federal office, the court of appeals then satisfied itself that the Commission's orders implementing the statute and resolving the dispute before it were supported by the record and did not represent an abuse of discretion. Again, as is evident from the opinion, the court of appeals performed its review function with care and a proper appreciation for the rights and claims of the disputing parties. (Pet.

App. 22a-42a) The networks obviously do not agree with the court's resolution of these questions; however, they have presented no reason to extend the review process one step further to this Court.

The court of appeals reasonably concluded that "the Commission was justified in pronouncing its right to decide when in the campaign the access rights granted to candidates by § 312(a)(7) attach" in view of the essential "objective, non-editorial" character of this judgment. (Pet. App. 29a) This is a question of fact capable of objective appraisal which is no different from those which must be resolved virtually every day by an agency like the FCC. Instead of raising a danger of excessive government involvement in the partisan political arena, as the networks suggest,[6] the Court correctly pointed out that the Commission, if anything, actually narrowed the scope of the statute and limited its impact on broadcasters. (Pet. App. 28a-29a) Moreover, the reasonableness of this particular determination is buttressed by the fact that Mr. Carter was the *last* candidate in either major party to declare participation in the 1980 presidential race. By that time, it was surprising that the networks would have even considered taking the position that the campaign season had not begun and refuse to sell time for that reason.

Against this background, both the FCC and the court of appeals then carefully sifted the competing claims of the parties over the reasonableness of the networks' refusals to sell time. The review was not done in a vacuum but was undertaken pursuant to the general enforcement policies which the Commission had previously set forth in its 1978 Policy Statement. *Report and Order, Commission Policy on Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). In particular, this *Policy State-*

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[6] See, *e.g.*, ABC Petition For Writ of Certiorari, p. 14.

ment flatly proscribed arbitrary across-the-board bans on the sale of time of the type which the networks still seek to justify in their petitions before this Court. Similarly, the other considerations advanced by the networks for their refusals (potential disruption of regular network programming, the number of other candidates likely to invoke equal opportunity rights, and the timing of the request) were carefully reviewed, first by the FCC and then the court below, and found to be insufficient to outweigh the competing reasons to sell advanced by the Committee.

The networks do not really contest the FCC's actual findings in this respect—but rather complain over the Commission's right to review the reasonableness of their decisions in enforcing Section 312(a)(7). Without any reference to the considerations laid out by the Commission in its 1978 *Policy Statement*, two of the three networks had flatly refused the Committee's timely request, and the third had merely offered two five-minute slots in lieu of the standard half-hour block of broadcast time that had been requested. Such arbitrary, blanket sales prohibitions were precisely what the Commission had previously warned against. Before the FCC, the networks were given every opportunity to explain and justify their flat refusals to sell and their explanations were accorded the maximum credit possible. The record left the court of appeals with little alternative but to find that the Commission's orders were a "very reasonable effort at implementing § 312(a)(7)." (Pet. App. 42a)

The fact that no satisfactory explanations have ever been put forth by the networks for their refusals carries with it the strong suggestion that they would simply prefer to sell available broadcast time exclusively to national commercial advertisers. If so, this attitude totally disregards the importance of political speech in our sys-

tem of government. Hopefully, this has been corrected by both the FCC's and the court of appeals' well reasoned opinions.

II. THE FCC'S CONSTRUCTION OF SECTION 312(a)(7), AS AFFIRMED BY THE COURT OF APPEALS, PROMOTES RATHER THAN CONTRAVENES THE FIRST AMENDMENT.

As implemented by the Commission in this case, Section 312(a)(7) "is a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters." (Pet. App 47a) Far from violating the First Amendment rights of broadcasters (as the networks contend), the FCC's interpretation of this important Congressional mandate as affirmed by the court of appeals furthers the essential First Amendment objective in broadcasting—the paramount right of the *public* to be politically informed. As the court so effectively pointed out, "the public's right to be informed is nowhere stronger than in the area of elections. And no speech is more protected than political speech." (Pet. App. 45a)

The purpose of the First Amendment in the sphere of broadcasting is to preserve an uninhibited marketplace of ideas. Accordingly, the rights of broadcasters, those who wish to present their views over the airways, and the public all must be considered and appropriately balanced. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). In this case, the court below carefully considered and weighed these competing rights, and correctly found that Congress and the FCC had reached an "acceptable accommodation" of all interests through the enactment and implementation of § 312(a)(7).

As noted in the court's opinion, "it is difficult to contend that the limited appropriation by government of

part of the available spectrum for use in informing the electorate is constitutionally unacceptable." (Pet. App. 45a-46a) *Red Lion* upheld the Commission's regulatory authority under the general public interest mandate of the Communications Act to require broadcasters under limited conditions to permit access to their facilities. Certainly, Congress (from whom the Commission receives its powers) has no less authority to act through legislation in an area where the nature of the speech sought to be fostered is of the highest priority.

Indeed, as this Court explained in *CBS* v. *DNC*, it is of special significance that a specific Congressional mandate is involved:

> . . . in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. . . . The judgment of the Legislative Branch cannot be ignored or under-valued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. *The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how other branches of Government have addressed the same problem.*

412 U.S. at 102-3 (emphasis added)

Notwithstanding the networks' claims, the limited candidate access rights legislated by Congress in Section 312 (a) (7), as interpreted in the opinions below, do not interfere with their journalistic interests. Quite to the con-

trary, the scheme devised by Congress, implemented by the FCC and validated by the court of appeals shows great sensitivity to the operation of the First Amendment in broadcasting by preserving the essential journalistic freedom of broadcasters while, at the same time, providing for the needs of the electoral process.

CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

JOHN D. LANE
RAMSEY L. WOODWORTH
HEDRICK AND LANE
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 628-5923

Attorneys for Respondent Carter/Mondale Presidential Committee, Inc.

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Nos. 80-207, 80-213, and 80-214

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

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NATIONAL BROADCASTING COMPANY, INC. PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT R. BRUCE
General Counsel

DAVID J. SAYLOR
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
LISA B. MARGOLIS
Attorneys
Federal Communications Commission
Washington, D.C. 20554

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the Federal Communications Commission's determination that Congress intended Section 312(a)(7) of the Communications Act to provide a limited affirmative right of

access to broadcast stations for federal political candidates to supplement the well established contingent right of individual access for all political candidates.

2. Whether Congress may strike a balance between the First Amendment rights of broadcasters and the paramount First Amendment rights of the public by adopting a limited right of access as it has done in Section 312(a)(7).

3. Whether the Commission has implemented Section 312(a)(7) in a manner consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is not yet reported. The decision of the Federal Communications Commission (Pet. App. 69a-109a) is reported at 74 F.C.C. 2d 631. The Commission's memorandum opinion and order denying reconsideration (Pet. App. 110a-151a) is reported at 74 F.C.C. 2d 657.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. Petitions for rehearing filed by petitioners in Nos. 80-213 and 80-214 were denied on May 15, 1980. On June 4, 1980, the Chief Justice extended the time for filing the petition in No. 80-207 to and including August 11, 1980. The petition for a writ of certiorari in No. 80-207 was filed on August 11, 1980. The petitions for a writ of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the "reasonable access" provision of Section 312(a)(7) of the Communications Act of 1934, 47 U.S.C. 312(a)(7), which imposes an obligation upon radio and television broadcasters to permit the "purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 4. One of the primary purposes of that legislation was "to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971).

1. In early October 1979, the Carter-Mondale Presidential Committee advised the three national television networks that it desired to purchase a thirty-minute time period during "prime time" on one network on December 4, 5, 6 or 7 to present a program to be run in conjunction with President Carter's announcement of his candidacy for reelection. The program was to consist of a documentary film outlining the President's record and that of his administration. The ABC and NBC networks both declined to offer any time for sale, essentially on the ground that it was too early in the presidential campaign to begin selling time for political broadcasts. The CBS network offered to sell two five-minute program segments to the Committee, one of which would be in prime time.

As a result of these responses, the Committee filed a complaint with the Commission asserting that the networks had violated the "reasonable access" provision of Section 312(a)(7) of the Communications Act by rejecting the Committee's request to purchase time. The Committee claimed that none of the reasons advanced by the networks for their refusals to sell the time requested was sufficient to justify their actions.

2. After considering the networks' responses to the Committee's complaint, the Commission found that each of the networks had acted unreasonably in responding to the Committee's request to purchase time and that they had thus failed to fulfill their obligations under Section 312(a)(7) of the Communications Act (Pet. App. 69a).

The Commission found no basis for the networks' conclusion that it was too early in the presidential campaign to begin selling time for political broadcasts. The Commission observed that an abundance of objective factual information compelled the conclusion that the presidential campaign was in "full swing" (Pet. App. 91a-

94a). Thus, the Commission determined that it was unreasonable for the networks to refuse to sell the Committee any time because of the earliness of the request (Pet. App. 94a-99a).[1] The Commission also concluded that the other reasons advanced by the networks to justify their responses to the Committee were insufficient. The Commission stressed that the networks' consideration of the request reflected the type of arbitrary, blanket policy that the Commission earlier had determined in its *1978 Report and Order* to be an improper means to implement Section 312(a)(7) (Pet. App. 98a-100a).

In a second order, the Commission denied petitions for reconsideration of its original decision (Pet. App. 110a). At the outset, the Commission rejected arguments that Congress intended Section 312(a)(7) merely to codify previous Commission practice rather than to enact a new right of access.[2] The Commission pointed out that it had

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[1]The Commission noted that, only a year earlier in a general policy statement on Section 312(a)(7), it had observed that the point when a broadcaster would be required to begin making time available would vary depending on the nature of the campaign—in some cases it might begin shortly before the election, and in others, such as presidential campaigns, it might begin as much as a year before the election (Pet. App. 88a, 91a). See *Report and Order on Enforcing Section 312(a)(7)*, 68 F.C.C. 2d 1079, 1091 (1978) (hereafter "*1978 Report and Order*"). See also Pet. App. 23a n.48.

[2]Prior to the adoption of Section 312(a)(7), the Commission had interpreted the general public interest standard of the Communications Act to impose an obligation on broadcasters to make some time available for political programming. However, under that policy, no candidate had an individual affirmative right of access to present political programming on a broadcast station; nor was any obligation imposed upon broadcasters to make time available to specific candidates. The requirement was simply that broadcasters could not refuse to present any political programming. Broadcasters were left with considerable discretion to determine what programming

rejected that argument in its 1978 Report and Order and that there was "no new or additional evidence that would warrant a departure from this construction of the statute" (Pet. App. 118a).

The Commission also observed that the threshold question of when the statutory obligations attach, *i.e.*, when broadcasters must begin affording reasonable access, is an "objective" issue that is appropriate for the Commission's independent evaluation, considering the status of the campaign, the position of the candidate and the network, and other relevant factors (Pet. App. 124a).

Because of the networks' apparent misunderstanding of the original order's discussion of the "candidate's needs," the Commission further explained the importance of, and the limitations on, that consideration. The Commission noted that the primary purpose for its focus on the candidate's needs was to ensure that broadcasters would give consideration to "each request in its own specific context on a particularized basis" (Pet. App. 126a). The Commission emphasized that "the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate" (*id.* at 128a), but rather is only one factor to be considered in the weighing process (*ibid.*). On the other hand, the Commission ruled that a broadcaster is obligated to attempt "to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking airtime" (*ibid.*). Thus, while noting that broadcasters are not expected to evaluate or censor individual programs, or to evaluate the

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would be presented based on their reasonable, good faith judgment about the importance and public interest in particular election campaigns. See generally *1978 Report and Order, supra,* 68 F.C.C.2d at 1087-1088.

"candidate's subjective, personal, or immediate 'political' desires" (Pet. App. 127a), the Commission stated that broadcasters must "consider the particular nature of the request made so that 'as much as possible' and 'within reasonable limits' airtime will be responsive to the candidate's needs" (*id.* at 135a).

The Commission also stressed the importance of a full explanation of the broadcaster's reasons for denying a candidate's request. Requiring a full explanation, the Commission observed, is "essential to assuring that we do give careful consideration and appropriate deference, to a broadcaster's discretion [because] [we] must deal essentially with the broadcaster's own reasoning—not generally with reasons we might have relied on" (Pet. App. 136a) (footnote omitted).

3. On petition for review, the court of appeals upheld the Commission's decision. The court carefully examined the language and the legislative history of Section 312(a)(7) and concluded that it was intended to "create an affirmative right of access for individual candidates for federal elective office" (Pet. App. 22a). The court explained that such a reading of the statute was consistent with this Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (hereafter "*CBS* v. *DNC*"). Although a footnote in that decision stated that Section 312(a)(7) "essentially codified" Commission policies developed prior to 1971 under the public interest standard, the court of appeals observed that such language was "not a denial that Congress had enacted, in 1971, a very specific, obligatory right of access for federal candidates" (Pet. App. 21a).

The court of appeals also concluded that, in implementing Section 312(a)(7), the Commission had "articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for

the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access" (Pet. App. 54a). The court rejected the argument that determination by the Commission of when statutory obligations attach, *i.e.*, when broadcasters must begin affording reasonable access, was improper (see Pet. App. 24a-29a). The court held the "determination of when statutory obligations attach is not an editorial decision * * * [but rather] is purely a legal judgment" (Pet. App. 28a). It added that this determination is one "for which the Commission is better suited than either broadcasters or candidates" (*id.* at 29a). Similarly, the court found no basis for the contention that, in making this decision, the Commission would impermissibly involve itself in the election process. It pointed out that "[t]his would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it had *already begun" (id.* at 27a). The court added that "[b]y confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters" (Pet. App. 29a).

The court also reviewed in detail the proceedural and substantive standards adopted by the Commission to determine whether reasonable access has been granted and found those standards rational and fair (Pet. App. 29a-42a). The court concluded that the record in this case supported the Commission's determination that the networks had failed to apply the proper standards (Pet. App. 39a-41a). The court observed that all three networks had "displayed unreasonable disregard for the relevant standards * * * [in adopting] across-the-board policies [which] violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster had to tailor his response to the *individual* candidate" (*id.* at 39a-40a).

Finally, the court found no basis for the contention that the statute unconstitutionally impinges upon broadcasters' editorial discretion (Pet. App. 42a-47a). The court pointed out that Section 312(a)(7) provides an affirmative right of access to a narrowly defined class of citizens only for political uses, that the Commission has developed procedures which afford substantial discretion to broadcasters, that the statute applies only during the "political season" when a campaign is fully under way, and that "Section 312(a)(7) represents only a congressional reallocation of the 'use' of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired" (Pet. App. 46a-47a).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petitions present no question that warrants this Court's review. That Congress enacted a limited individual right of access, as the Commission and the court of appeals concluded, is evident on the face of the statute and is supported by its legislative history. Petitioners have made no showing that the Commission's contemporaneous and subsequent uniform construction of the statute is in error.

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[3]In a concurring opinion, Judge Tamm expressed concern over potential abuses of the statute (Pet. App. 56a-68a). However, despite that potential, he concurred in affirming the Commission's decision because "section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), because "we dare not forget that there is also a potential for evil in leaving the question of access in the hands of private broadcasting interests" (*id.* at 65a-66a), and because "the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity" (*id.* at 67a).

1. Although there are constitutional claims made in this case, as there are in virtually every dispute between broadcasters and the FCC, the questions are hardly novel. The congressionally mandated scheme for "reasonable access" by individual federal candidates is no more than a limited augmentation of a well established statutory pattern of broadcast regulation, which allocates broadcast time for use by candidates for public office. This Court has repeatedly found this overall statutory plan, which balances the First Amendment rights of broadcasters and those of their listeners, to be consistent with constitutional requirements. See, *e.g.*, *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); see also *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943). The constitutional questions presented by petitioners are readily resolved under the principles of those cases. Within the statutory framework of the Communications Act, broadcasters in the political broadcast area have always been subject to special obligations, including an affirmative obligation to allocate time for political candidates generally. In addition, a candidate's individual right of access to a broadcast station, albeit on a contingent "equal opportunities" basis, has been a core element of federal regulation since 1927. That access right has always contemplated presentation of some programming over which candidates (rather than broadcasters) have editorial control. Thus, from the inception of broadcast regulation, Congress has required allocation of broadcast time for political "uses"[4] and has

[4]The term "use" refers to personal appearances by a candidate on non-exempt programs. *Primer on Political Broadcasting and Cablecasting*, 69 F.C.C. 2d 2209, 2240 (1978). Under the terms of the statute four categories of news programs are "exempt." *Id.* at 2246.

limited the normally broad scope of broadcaster discretion with respect to such political uses. Section 312(a)(7), as interpreted by the Commission, is fully consistent with that long-established statutory scheme.

Insofar as petitioners direct their arguments against the Commission's implementation of the statute, they also raise no issue warranting further review. Petitioners' claims in this regard are largely abstract and speculative. The Commission's decision here involves no government review or abridgment of editorial discretion. It merely enforces the well established Commission doctrine that broadcasters must respond individually to individual requests from candidates, rather than relying solely on across-the-board policies. Moreover, petitioners have presented no evidence of Commission interference in the editorial functions of broadcasters during the statute's eight year existence. There is no ground to assume that the statute, as interpreted by the court of appeals and the Commission, will not be implemented in a manner that respects all of the important First Amendment interests at stake.[5]

2. Petitioners contend that Section 312(a)(7) merely codified policies developed by the Commission prior to 1971 under the public interest standard of the Communications Act, and did not create a new right of access. See No. 80-207 Pet. 17; No. 80-213 Pet. 9; No. 80-214 Pet. 25. As the court of appeals correctly held, however, the

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[5]Petitioners have shown none of the "day-to-day intrusion" into the editorial process about which they speculate. If a pattern of intrusive implementation should develop, the Court can consider those issues in a case where they are directly presented. Because this statute makes such "a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), the Commission's administration of the statute should not be distrubed in the absence of concrete evidence of actual improprieties.

plain language of the statute demonstrates that it was intended to create a new affirmative right of access for individual federal political candidates. That interpretation of the statute is supported by the legislative history and is consistent with the Commission's long-standing construction of the provision.

The plain language of Section 312(a)(7) vests in "a legally qualified candidate for Federal elective office" the right of access to a broadcasting station to obtain broadcast time "on behalf of his candidacy." By contrast, the Commission's policy prior to 1971 gave no attention to individual candidates. Broadcasters were required only to make reasonable, good faith judgments about the importance of particular political races and, on the basis of those judgments, to determine how much time should be made available for candidates in each race. See *1978 Report and Order*, *supra*, 68 F.C.C. 2d at 1088. See also note 2, *supra*. As the court of appeals observed, "[t]he change of focus manifested in the language of Section 312(a)(7) * * * indicates that Congress was doing something different in that provision and supports the view that the legislators were creating a new right for individual candidates when they passed that provision" (Pet. App. 16a).[6] And that interpretation of the statute, as the court of appeals correctly held, finds substantial support in the legislative history.[7]

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[6]The language of the statute also limits the applicability of the right of access to individual candidates for *federal* office. The public interest standard, on the other hand, applies to all offices. The application of Section 312(a)(7) only to federal candidates "is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine" (Pet. App. 16a).

[7]The court's analysis rested on a number of grounds. The court pointed out that one of the primary purposes of Title I of the Federal Election Campaign Act of 1971, of which Section 312(a)(7) was a

Although petitioner CBS points out that Section 312(a)(7) was enacted against a "long tradition" of withholding affirmative rights of access to individuals (No. 80-207 Pet. 17), CBS ignores another, and equally important, aspect of that "long tradition." Historically, the Commission has required broadcasters to set aside time for political candidates under Section 315 and has accordingly limited broadcasters' discretion with respect to that time. See 47 U.S.C. 315(a); *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The concept of individual access, albeit contingent, for political candidates has thus been an integral part of federal regulation of radio broadcasting since 1927. Congress' addition of the duty to afford "reasonable access" to individual federal candidates in an affirmative manner was not a remarkable event. Section 312(a)(7) represented only a limited extension of the pre-

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part, was "to give candidates * * * *greater access* to the media * * *." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971) (emphasis supplied) (Pet. App. 17a). The court also noted that when Congress adopted Section 312(a)(7), it added language, described as a "conforming amendment," to Section 315(a) of the Communications Act, 47 U.S.C. 315(a). The court properly concluded that if Section 312(a)(7) was meant merely to codify pre-existing obligations, no such "conforming amendment" to Section 315(a) would have been required. See Pet. App. 18a. Petitioners' arguments that the legislative history evidences congressional intent to accomplish the additional goals of shortening campaigns and reducing campaign spending incorrectly assumes that the Commission's construction of Section 312(a)(7) would be inconsistent with those goals and overlooks the fact that other sections of the 1971 Act were primarily directed toward meeting those goals (See No. 80-207 Pet. 20-21; No. 80-213 Pet. 15; No. 80-214 Pet. 21). Campaigns were to be shortened by limiting application of the "lowest unit charge" provision to specified periods (see S. Rep. No. 92-96, *supra*, at 28). Campaign spending was to be reduced by the imposition of campaign expenditure limitations. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Sections 103-106, 86 Stat. 4-8.

existing contingent individual right of access which Congress has always provided for the clearly defined and narrow class of political candidates.

Furthermore, immediately following adoption of Section 312(a)(7), and in subsequent rulings, the Commission has consistently interpreted the statute as imposing additional obligations on broadcasters.[8] That interpretation is entitled to the "great deference [afforded] to the interpretation given [a] statute by the * * * agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); see also *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980).

To support their interpretation of the statute, petitioners rely on a footnote in this Court's opinion in *CBS* v. *DNC*, *supra*, 412 U.S. at 113-114 n. 12, which observed generally that Section 312(a)(7) had "essentially codified" prior Commission policy. See No. 80-207 Pet. 18; No. 80-213 Pet. 9; No. 80-214 Pet. 27. Petitioners read far more into that footnote observation than is appropriate. The court of appeals correctly stated that the footnote was dictum which appeared in a case quite different from the present case. "[T]he Court simply had no need to pass on whether Congress had adopted the * * * limited affirmative right of access embodied in Section 312(a)(7)" (Pet. App. 21a). Moreover, the generality of this Court's observation is a sufficient indication that it was not intended to constitute a resolution of the issue presented here.

2. Petitioners assert that the constitutionality of an affirmative, individual access scheme constitutes a novel

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[8]See, *e.g.*, *Use of Broadcast Facilities by Candidates for Public Office*, 34 F.C.C. 2d 510, 538 (1972); *Licensee Responsibility Under FECA 1971*, 47 F.C.C. 2d 516 (1974); *1978 Report and Order*, *supra*, 68 F.C.C. 2d at 1088.

issue that warrants review by this Court. See No. 80-207 Pet. 13; No. 80-213 Pet. 7; No. 80-214 Pet. 18. However, prior rulings of this Court deprive the issue of virtually all of its novelty. The governing First Amendment principles are clear and well settled. In *Red Lion*[9] and *Pacifica*,[10] this Court held that the broadcasting medium occupies a unique position under the First Amendment. In contrast to the publishing industry, in which entry is open to all and mandatory public access is unnecessary, in the limited electronic spectrum, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. While *CBS* v. *DNC*, *supra*, confirmed that substantial editorial discretion must be preserved to the broadcaster, it did not repudiate the principle that the rights of listeners and viewers are paramount. 412 U.S. at 102. Those rights merit special protection in cases such as this, where the speech at issue concerns political elections. As the Court has long recognized, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964); see also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776-777, 786, *rehearing denied*, 438 U.S. 907 (1978).

Thus, the ruling below that Section 312(a)(7) gives primacy to the rights of the viewing audience to receive political information does not present a novel question. The only arguably unique aspect of this provision is that it creates an affirmative or initial (not merely contingent) right of access.[11] But even that right is not entirely

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[9] *Red Lion Broadcasting Co.* v. FCC, 395 U.S. 367, 386 (1969).

[10] *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[11] An affirmative or initial right of access is one that exists independent of any prior action of the broadcaster. By contrast, a contingent right of access is triggered by some previous event under the broadcaster's control (Pet. App. 14a).

unprecedented when viewed in the context of the long-standing requirement under the Communications Act that broadcasters set aside time for political candidates.[12] Since the inception of federal regulation of radio, broadcasters have been required under the "public interest" standard to afford access to political candidates. See *Programming Policy Statement*, 44 F.C.C. 2303, 2314 (1960). Section 312(a)(7), as interpreted by the Commission and the court below, is only a refinement of that more general obligation.

In contending that the opinion below is inconsistent with the holding of *CBS* v. *DNC*, *supra* (No. 80-207 Pet. 24; No. 80-213 Pet. 23; No. 80-214 Pet. 17), petitioners ignore the very different context and narrow holding of that decision. That case involved an expansive scheme of first-come, first-served access to the broadcast media for the *general public*. The court of appeals concluded that the First Amendment required broadcasters to accept paid editorial announcements from the public at large and directed the Commission, which had concluded to the contrary, to develop procedures to implement such a scheme. In reversing that decision, this Court emphasized that, in evaluating a broadcaster's First Amendment claims, "great weight [must be afforded] to the decisions of Congress and the experience of the Commission." 412 U.S. at 102. The Court added that the primary role in determining how to provide for the most efficient use of the radio spectrum belongs to Congress. Taking First Amendment objectives into account, "Congress and the Commission *could* appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee * * *." *CBS* v. *DNC*, *supra*, 412 U.S. at 125 (emphasis supplied). But the Court left room for other approaches: "Conceivably at some future date

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[12]See page 10 *supra*.

Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131.

In enacting Section 312(a)(7), Congress fashioned just such a "limited right of access that is both practical and desirable." The statute is a reasonable exercise of Congressional authority and it is entitled to the great weight that *CBS* v. *DNC* said must be afforded to legislative judgments in this area. It operates only with respect to a narrow and precisely defined group of individuals—legally qualified federal candidates—whose speech merits special protection for the benefit of the electorate as a whole.[13] Section 312(a)(7) is designed to apply only at crucial times, *i.e.* when election campaigns are in full swing. Section 312(a)(7), when applied together with Section 315, establishes a largely self-enforcing scheme. Unlike a more open-ended general access scheme, Section 312(a)(7) leaves little room for disputes over, and resulting governmental oversight of, such initial issues as which speakers have access rights, which speakers are entitled to responsive time, and how much time is to be made available.

On the other hand, the scheme provides broad discretion to broadcasters as to the scheduling and amount of time to be initially offered, so as to enable them to function smoothly in their daily operations and to minimize the governmental role.[14] In view of all of these

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[13]The Commission has adopted specific rules which define who is a "legally qualified candidate" entitled to invoke Section 312(a)(7). See 47 C.F.R. 73.1940 (1979 ed.).

[14]Petitioners' assertions that the Commission's implementation of Section 312(a)(7) has left broadcasters with little or no editorial discretion is simply not borne out by the record below. The Commission emphasized that it has confined itself to a very narrow review of broadcaster refusals to provide reasonable access (see Pet.

factors, which were not present in *CBS* v. *DNC*, there is little danger that, under Section 312(a)(7), the Commission will be drawn into a "continuing case-by-case determination of who should be heard and when." *CBS* v. *DNC*, *supra*, 412 U.S. at 127.[15]

3. The argument of petitioner NBC (No. 80-412 Pet. 10-17) that the Commission's construction of Section 312(a)(7) unconstitutionally intrudes upon the electoral process is without basis, resting on the inaccurate premise that FCC supervision of broadcasters' compliance with the statute somehow amounts to FCC control of the federal electoral process.

The court of appeals correctly held that "the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process. There is nothing offensive about such a system" (Pet. App. 27a). The Commission's consideration of the views of broadcasters and candidates, as well as more objective factors (such as newspaper coverage of elections), and its determination based thereon as to whether a campaign is sufficiently underway for the access right to attach, are government functions which the Commission must

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App. 134a-137a) and pointed out that the standards which were relevant to its review worked overwhelmingly to favor broadcaster discretion (See Pet. App. 135a). Moreover, the Commission stressed that it would evaluate complaints on the basis of a broadcaster's own explanation of its decisions with respect to access requests, not the Commission's independent view of what would have been reasonable.

[15]Since the release of the Carter-Mondale rulings, only eight rulings involving Section 312(a)(7) have been released by the Commission or its staff and in only one of those eight cases was a licensee found to have acted unreasonably. See *Kennedy for President Committee*, 46 Rad. Reg. 2d (P&F) 1539 (1980).

perform if the statute is to have force. The performance of those limited functions does not interject the Commission into the electoral process itself.[16]

Similarly, the Commission's insistence that broadcasters consider "candidates' needs" by providing individual responses tailored to each candidate's request to purchase time, rather than by adopting arbitrary, across-the-board policies that do not take into account the nature of the individual candidate's request, does not involve the Commission or the broadcaster in making a value judgment about a candidate or his campaign. The Commission has merely discharged its responsibility to promulgate policies and rules (47 U.S.C. 303(r)) which are needed to enforce a provision of the Communications Act that expressly requires broadcasters to provide "reasonable amounts of time" and "reasonable access" to individual candidates for federal office.

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[16]The Commission noted that its determination of when Section 312(a)(7) obligations attach would take into account "both the complainant's and the broadcasters' showings," as well as "independent indicia" (Pet. App. 136a n. 21; see also Pet. App. 124a, 92a-94a). Moreover, the Commission's role in determining when Section 312(a)(7) obligations attach is not materially different from its longstanding role in determining who constitutes a "legally qualified candidate" for purposes of deciding when Section 315 obligations attach. 47 U.S.C. 315.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. BRUCE
General Counsel

DAVID J. SAYLOR
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
LISA B. MARGOLIS
Attornyes
Federal Communications Commission

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DOJ-1980-09

Nos. 80-207, 80-213, 80-214

SEP2 1
MICHAEL RODAK,

IN THE

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October Term, 1979

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v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

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NATIONAL BROADCASTING COMPANY, INC.,

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(*List of counsel on inside cover*)

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

Barry D. Umansky
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560
Of Counsel

Erwin G. Krasnow
(Counsel of Record)
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560
Attorney For Respondent
NATIONAL ASSOCIATION
OF BROADCASTERS

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STATEMENT OF THE CASE

Respondent National Association of Broadcasters (NAB)[1] relies upon the Statement of the Case found in those Petitions for Certiorari submitted to this Court.

SUMMARY OF ARGUMENT

In this brief memorandum, respondent NAB states its support for the many reasons advanced by petitioners justifying the issuance of a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. Petitioners demonstrate that Section 312(a)(7) of the Communications Act, as construed by the Federal Communications Commission (J.A. 69a) and affirmed by the court below (J.A. 1a), violates broadcasters' First Amendment and statutory rights by usurping from broadcasters the editorial discretion involved in the provision of broadcast time to candidates for federal office. Such construction, as emphasized by petitioners, is inconsistent with the fundamental premise of broad licensee discretion embedded in the Communications Act, contrary to the legislative history and purposes of Section 312(a)(7) and in basic conflict with this Court's interpretation of Section 312(a)(7) in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*CBS* v. *DNC*) 412 U.S. 94, 113-114 (1973).

The recent decisions of the Commission and the court below rejecting the argument that broadcasters may adopt political sales policies fashioned to uniformly meet the needs of all candidates is in sharp contrast to the Commis-

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[1]NAB was an intervenor in the proceedings below and files today as respondent supporting the position of petitioners, pursuant to Rules 19.6, 22 and 34.2 of this Court.

sion's heretofore consistent policy of broadcasters affording equal treatment to political candidates vying for the same political office. Requiring a broadcast licensee to focus solely on the individual candidate's needs, as stated by the candidate, and appointing the Commission as the final arbiter of the station's "reasonableness" in meeting these individual candidate needs, impermissibly restricts the broadcaster's editorial judgment and establishes a dangerous system of government second-guessing and programming control. The underlying Commission decision and reconsideration denial, voted along political party lines, highlights the potential for government manipulation of political access under the Section 312(a)(7) construction adopted by the Commission and affirmed by the court below.

Though arising in the context of a request for network access by a presidential incumbent, the decision below applies with equal force to political advertising requests by candidates for the Senate and the House of Representatives. It will be individual stations, not networks, that will be presented with such federal candidate "reasonable access" requests. NAB, which represents the interests of over 5,000 radio and television stations, emphasizes here the sweeping nature of the Commission's abrupt change in policy *vis-a-vis* individual station decisionmaking. Absent review by this Court, the editorial rights of individual stations would be severely constricted and the Commission would be conferred with the Constitutionally objectionable (and virtually impossible) administrative task of reviewing each station determination as to when a campaign has begun and whether reasonable access has been afforded. The Commission and the court below have failed to give individual local stations, faced with a multitude of federal and non-federal political access requests, any

clear guidance. Instead, these licensees are left with little more than the Hobson's choice of granting each federal candidate's request in full or risking Commission censure or even license revocation based on a subjective after-the-fact review. To place broadcast licensees in such a position violates not only the First Amendment but the spirit and letter of the Communications Act and the clear ruling of this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT AND HAS DECIDED AN IMPORTANT STATUTORY QUESTION CONTRARY TO A DECISION OF THIS COURT.

The lower court's affirmation of the Commission's decision raises a considerable number of concerns directly affecting all of broadcasting. NAB supports the network petitioners in their request for the writ of certiorari with the hope that these important questions may be answered. In particular, NAB wishes to underscore petitioners' basic argument that the lower court erred in affirming the Commission ruling that, when making reasonable access decisions, networks (indeed, all broadcasters) must give preeminence to the "individual needs" of the candidate for program time. The court's decision on this matter upsets the delicate balance of rights between candidates and broadcasters established by Congress in §312(a)(7). The reasoning of the court's decision would have broadcasters' reasonable access decisions determined more by the needs of an individual candidate than by the needs of all candidates taken together. Such a construction of Section

312(a)(7) would be in basic conflict with the Congressional policy of giving equal treatment to all candidates for the same office.[2]

Moreover, the lower court's decision has the effect of casting the Commission in the role of final arbiter of each "reasonable access" decision. This redefining of the Commission's role is repugnant to the basic legislative scheme of §312(a)(7),[3] and contrary to the First Amendment principles articulated by this Court. In *CBS* v. *DNC, supra,* this Court held that broadcasters' journalistic decisions must be shielded from government's oversight. There the Court pointed to the dangers inherent in the "enlargment of government control over the content of broadcast discussion" and government second-guessing of "the day-to-day operations of broadcasters' conduct."[4]

But the decision below would deprive broadcasters of the journalistic discretion assured by *CBS* v. *DNC.* This means that broadcasters must now "tailor" their responses to the needs of an individual candidate. Broadcasters are no longer free to adopt policies of broad application designed to accommodate the needs of all candidates and to take into account their other operations and scheduling. Although networks and stations are still permitted to consider these factors, to some degree, they must give *special* weight to an additional factor identified by the Commission: "the specific needs of the candidate." (J.A. 41a.) and that weighing process for the individual candidates is to

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[2]Section 315(a) of the Communications Act, establishing the law of equal opportunities, is based on equality of treatment of all candidates running for a particular office, be it federal or non-federal.

[3]S. Rep. No. 96, 92d Cong., 1st Sess. (1971).

[4]412 U.S. at 126-127.

be supervised by the Commission on a "campaign-by-campaign" basis. (J.A. 29a).

The opinion of Judge Bazelon gives but short shrift to the dangers inherent in this characterization of reasonable access. Judge Tamm, in his concurring opinion however, eloquently identifies the clear dangers and potential "benefits" of this interpretation of Section 312(a)(7):

> ". . . Section 312(a)(7), as implemented by the Commission, stands precariously on the first amendment tightrope. It raises the serious danger of nonneutral government action favoring one speaker or viewpoint over another. Yet, it also makes a great contribution to the cause of encouraging an 'uninhibited, robust, and wide-open' discussion of issues central to our system of government." (J.A. 67a.)

Unfortunately, Judge Tamm resolved this tension in favor of the Commission by a leap of faith, with the hope that "adequate safeguards" would minimize the dangers of this oversight role. NAB does not share Judge Tamm's optimism. The potential for government favoritism and abuse in this area is simply too great. Indeed, as Judge Tamm recognized, it is inherent in the decision-making process itself:

> ". . . we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests . . . the President of the United States appoints all seven of its members and designates its chairman. (*See* 47 U.S.C. Section 154(a) (1976)). Commissioners serve seven-year terms, and vacancies occur approximately once a

> year. (*Id.*, Section 154(c)). To the extent that openings arise, the President may, and typically does, ensure that four of the seven Commissioners are members of his own political party. (*See* Section 154(b)). As the present case suggests, the campaign for President is likely to be the most important occasion for the application of Section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a Presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. *Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously infuence his decision-making."* (J.A. 63a-64a.) [Emphasis Added]

The fear of increased government involvement and the inevitable political overtones that accompany such activity are concerns petitioners present. The implications of a "politically interested" agency controlling the very elective process which governs the fate of that agency's personnel is fraught, at the very least, with potential for the appearance of impropriety. Both petitioners and Judge Tamm's concurrence accurately reflect the concern such a situation presents. It is essential to a free electorate that government involve itself as little as possible in the elective process. The Commission's decision and the resulting implication represent involvement in opposition to previous policies, contrary to the best interests of the public, and in direct conflict with the First Amendment.

The political factors identified by Judge Tamm and petitioners were the very kinds of dangers that this Court recognized in *CBS* v. *DNC*. Indeed, up until the time it decided the instant case, involving an incumbent Presidential candidate, the Commission itself refrained from entering into programming decision second-guessing when construing Section 312(a)(7). *Re Complaint of Honorable Pete Flaherty,* 48 FCC 2d 838 (1974); *Matter of Anthony Martin-Trigona,* 66 FCC 2d 968 (1977). In *Pete Flaherty,* the Commission observed

> ". . . were we to call upon licensees to justify their programming selections and scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when — a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." (48 FCC 2d at 849.)

That sentiment was reiterated in *Martin-Trigona,* wherein the Commission held that a licensee's discretion extends

> ". . . not only to the type and amount of time to be made available to candidates, but also to the date on which campaign coverage will commence." 66 FCC 2d at 969.

Indeed, it appears that the factual distinction which led the Commission to depart from the reasoning of *Pete Flaherty* and *Martin-Trigona* in the instant case was the identity of the candidate involved.

The court below, in *Columbia Broadcasting System, Inc.* v. *FCC,* 454 F.2d 1018 (1971), a case involving Presidential media access, observed that a Commission decision disregarding Commission precedent and favoring

the incumbent President "raises serious questions concerning the requirement of government neutrality in the area of the First Amendment." 454 F.2d at 1034. No matter what safeguards are applied, it is difficult to see how, in this highly charged political atmosphere, the Commission can maintain a neutral oversight role under its judicially-affirmed construction of Section 312(a)(7). Moreover, despite the lower court's suggestion that such an oversight role is necessary to protect the "public's right to be informed about elections," (J.A. 47a) neither the Commission nor the complaining committee had contended that the public has not been fully informed about the primary elections or the President's campaign. Where, as here, there is no compelling need for government oversight, there can be no justification for an intrusion upon valued First Amendment rights.

Petitioners' concern over the Commission's delving into broadcasters' editorial/journalistic judgments is well-founded. The issues of increased governmental activity in the elective process and the further intrusion of government in areas until now protected by the First Amendment, most certainly require evaluation and clarification by this Court so both broadcasters and the Commission may fully understand the parameters within which they respectively are to function.

The lower court's ruling, in addition to being interpreted as an affirmation of the Commission's unjustified reversal of prior policy, is also seen by NAB as directly contrary to this Court's determination that Section 312(a)(7) "essentially codified" the Commission practice concerning the requirement that broadcasters make time available for political candidates – a practice which relied on broadcasters' good faith discretion. *CBS* v. *DNC, supra,* 412 U.S. at 113-14, n.12. With the lower court's cavalier

dismissal of this plain language as "dictum",[5] there is a clear conflict now existing between this Court's interpretation of Section 312(a)(7) and the lower court's ruling. It is essential that a writ of certiorari be granted to resolve this matter.

II. THE DECISION OF THE COURT BELOW, DEPRIVING INDIVIDUAL BROADCAST STATIONS OF THEIR STATUTORY AND CONSTITUTIONAL RIGHTS AND ESTABLISHING AN UNWORKABLE AND UNLAWFUL SYSTEM OF GOVERNMENT OVERSIGHT OF EDITORIAL DISCRETION, SHOULD BE REVIEWED BY THIS COURT.

The concerns expressed by petitioners are important issues which directly affect all broadcast licensees. The sudden reversal in Commission policy is certain to involve the agency more deeply in day-to-day broadcast operations. Prior political access policies acknowledging licensee latitude and discretion in dealing with candidates effectively have been eliminated by the lower court decision.

The lower court's rejection of the concept of broadcasters establishing general policies concerning federal political campaigns has tremendous implications. Such a rejection casts aside traditional Commission-supported practices which have enabled both candidates and stations to remain assured that political aspirants are being treated

[5]Indeed the Commission had consistently given this discretion to broadcasters following the passage of Section 312(a)(7) as well as before its enactment into law: "Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes 'reasonable access' under all the circumstances present in a particular case." *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079 (1978).

fairly. This "similar treatment" concept is not only one of basic fairness but is also firmly established in the lowest unit rate and equal opportunities requirements embodied in the Communications Act.

The lower court's affirmation of the Commission view that broadcasters now must "individualize" their treatment of candidates is fraught with potential for inequity and abuse, intentional or not. With the many political races in a station's service area (local, statewide, and federal) the multitude of demands for access, and the differences in those demands, station management must be allowed to establish policies which both facilitate their operation in the public interest and assure *all* candidates fair treatment. Without clear policies and guidelines the variety of political requests themselves virtually guarantees that candidates will be presented to the public in a manner which cannot help but be uneven.

As an association of thousands of radio and television stations, NAB must bring to this Court's attention the detrimental effect of the lower court's decision on individual stations. These adverse effects, measured in terms of restricted First Amendment rights and emasculated journalistic and programming discretion, will be imposed on individual station licensees. Moreover, the "legal judgment" duty the Commission, with lower court approval (J.A. 28a), so willingly undertakes, amounts to an unworkable administrative task. The need for this Court's review of the lower court decision is most evident in light of the dilemma which may now confront a licensee in any major community during election time. One example would be that of a wide-serve AM station in Minneapolis, Minnesota. Analyzing the station's situation under the most conservative methodology, there are a total of nine Congressional districts in the station's coverage area. In

six of them, the licensee could anticipate a minimum of four *bona fide* primary candidates from each of the two major parties, for a total of 24 possible claimants for time. In the remaining three Congressional districts, which are predominantly urban, the station may expect a minimum of seven candidates for a separate total of 21. Because the station also covers part of Wisconsin, it could also be obligated under this decision to provide time to a minimum of four possible Wisconsin candidates for the U.S. Senate. In addition, every four years there will be perhaps a dozen candidates for the Presidency. Thus, approximately 60 federal candidates might demand that this single licensee sell them substantial blocks of time. Additionally, there are dozens of non-federal candidates that may be seeking broadcast time during these periods. In some parts of the United States, notably in the tri-State New York City market, this individual licensee problem would enlarge by geometric proportions. In short, broadcasters have many competing considerations to assess in deciding when to afford time and how much to provide individual candidates. The Commission's decisions and the opinion of the court below afford no clear standard for licensee judgment. The standard for determining when a campaign begins, a decision which the Commission will determine "objectively" as a "legal judgment," is nowhere defined. A directive for stations to focus on candidates' individual needs, as stated by the candidate, is meaningless in terms of a "weighing" process, because each candidate obviously will contend he "needs" the time requested. This in fact removes any substantive discretion from the licensee.

A clear decision is essential to delineate whose responsibility it is to determine when the many different federal election campaigns begin across the nation and how much time provided each candidate would amount to "reason-

able access." Prior to the instant controversy the individual, locally-sensitive broadcaster, in the exercise of his editorial discretion, evaluated the political climate of his service area in determining the amount of time to be allocated and the appropriate date to reasonably permit access. The lower court decision effectively removes to Washington that very important and highly localized decision, transforming it along the way from an editorial decision to a purely "legal judgment." Increased government involvement in an area as sensitive as the political arena is regarded by NAB as a highly suspect goal, especially when it is uncontested that the broadcast industry has, on the whole, met and answered fairly the needs of both the electorate and the candidates in past campaigns.

The orderly and equitable presentation of the candidates to the public has, in the past, been the responsibility of the licensee. It is the licensee who will be challenged should one or more of the candidates feel they have been dealt with unfairly. The legal and administrative costs of such an ordeal would themselves be reason enough for many station owners to give all federal candidates all the broadcast time requested. (That solution, however, is not in itself foolproof, for challenges of unfairness may still come forth.) Such a course, more importantly, is not responsible, public interest broadcasting, is inconsistent with the intent of Congress and contravenes the most basic principles of the First Amendment.

Section 312(a)(7), as interpreted by the lower court, provides yet another vehicle whereby the government is able to impose directly and more subtlety its subjective evaluation of a given situation, rather than to defer, as directed by this Court in *CBS* v. *DNC,* to the judgment of the station licensee. The Commission's decision in this case invites this added administrative involvement to all levels of

broadcasting, from the networks to the small radio or television station. This additional area of Commission activity will create further administrative mazes through which broadcast stations must find their way. The broadcast industry, which is already highly sensitized to each edict from the Commission, will be needlessly forced to anticipate, document, and defend every nuance and variation in the treatment of each individual candidate. To do otherwise would expose the licensee, at the very least, to costly Commission review of that treatment and, perhaps, to loss of a station license.

Judge Bazelon, author of the lower court's majority opinion, well described the relationship between the Commission and its licensees:

> One first notes a pervasive regulatory scheme in which the licensees are dependent on the FCC and the government for their economic well-being. The main threat is, of course, that the government can put a licensee out of business but I suppose that the more pervasive threat lies in the sub rosa bureaucratic hassling which the Commission can impose on the licensee, i.e., responding to FCC inquiries, forcing expensive consultation with counsel, immense record-keeping and the various attendant inconveniences. Next in rank in potential threats lies government refusal to grant economic and other related benefits which the licensees seek through the legislative or administrative process, such as the recent license renewal bill and grant of renewal by the Commission without a hearing. For better or worse, a licensee confronted with the choice between an economic disadvantage and pleasing the government through curtail-

> ment of a constitutional right will generally choose curtailment. Thus, licensee political or artistic expression is particularly vulnerable to the 'raised eyebrow' of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury. Examples of this process are legion.[6]

In sum, the lower court's interpretation of Section 312(a)(7) topples the delicate balance established for broadcast coverage of the electoral process. It is in conflict with basic First Amendment principles, inconsistent with the intent of Congress, fraught with the potential for political abuse and contrary to a specific holding of this Court.

CONCLUSION

For the reasons stated above and in the petitions filed before this Court, certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

Erwin G. Krasnow
Attorney for Respondent
National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 293-3560

Of Counsel
Barry D. Umansky

[6] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 407 (1975) (separate statement of Chief Judge Bazelon).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

Of Counsel:

RALPH E. GOLDBERG
CBS Inc.
51 West 52 Street
New York, New York 10019

JOSEPH DEFRANCO
CBS Inc.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

October 3, 1980

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---

REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

Respondents in their oppositions appear to argue that certiorari should be denied because the court of appeals' decision was correct. We believe that the issues in this case are important and warrant review by this Court and that the decision of the court below is directly at odds with decisions of this Court, pertinent legislative history and the First Amendment.

1. Respondents Federal Communications Commission and the United States (the "Federal respondents") make

the remarkable suggestion that Section 312(a)(7), 47 U.S.C. § 312(a)(7), as interpreted by the Commission, is "fully consistent" with the longstanding policies of the Act.[1] In their view, Section 312(a)(7) "is no more than a limited augmentation of well established statutory pattern of broadcast regulation."[2] This "well established pattern" simply does not exist. As we discuss in greater detail below, neither Section 315 of the Act, 47 U.S.C. § 315, nor any other section heretofore conveyed an affirmative right of access to political candidates or any other speakers. The Commission's pre-existing policy under the public interest standard did not delegate to individual candidates the right to demand access according to their individual needs, but instead allowed the broadcaster considerable latitude in determining when and under what circumstances political time should be sold.[3]

In making their claim, these respondents do not even mention this Court's recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), which, as we pointed out in our petition, is central to this case.[4] In *Midwest Video*, this Court made clear that Commission regulations affording rights of access to individual speakers in the first instance are fundamentally inconsistent with the policies of the Communications Act against treating

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[1] Brief for the Federal Respondents in Opposition ("Fed. Opp.") at 9. At the same time, however, both the Federal respondents and Respondent Carter-Mondale Presidential Committee, Inc. ("CMPC") argue that Section 312(a)(7) was intended to create a new, individual right of access to the broadcast media for federal candidates. Fed. Opp. at 9-10; Brief for Respondent Carter-Mondale Presidential Committee, Inc. in Opposition ("CMPC Opp.") at 5.

[2] Fed. Opp. at 8.

[3] *See* FCC Memorandum on Second Sentence of Section 315(a), reprinted in *Political Broadcasts—Equal Time: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce on H.J. Res. 247*, 88th Cong., 1st Sess. 90 (1963).

[4] Petition for Certiorari in No. 80-207 ("Pet.") at 17-18.

broadcasters as common carriers. As this Court stressed in striking down Commission regulations providing for access to cable television systems as contrary to Section 3(h) of the Act, 47 U.S.C. § 153(h), "we are unable to ignore Congress' stern disapproval—evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike." 440 U.S. at 708; *see also id.* at 702-06; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-14 (1973) ("*CBS* v. *DNC*").

2. The history of Section 312(a)(7) shows, moreover, that Congress in enacting Section 312(a)(7) intended no departure from the well-established general policy described in *Midwest Video*. In *CBS* v. *DNC*, this Court recognized that Congress has repeatedly refused to enact proposals designed to grant rights of access to particular individuals and groups. 412 U.S. at 113-14. In support, this Court stated that Section 312(a)(7) merely "codified" the Commission's prior practice, under which a broadcaster retained great discretion in responding to individual candidates' requests to purchase time. *Id.* at 113-14 n.12. Respondent CMPC simply ignores this statement; the Federal respondents dismiss it as "dictum" and, quoting the court of appeals, urge that this Court's view is of little significance because this "Court simply had no need to pass" on the question.[5] As we have discussed in our petition, this Court's findings as to the scope of Section 312(a)(7) were central to its conclusion that the Communications Act reflected a policy of not granting rights of access to individual speakers in the first instance.[6]

Moreover, contrary to the Federal respondents' suggestion[7] this Court's statement as to the meaning of

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[5] Fed. Opp. at 12, *quoting* App. A. at 21a.

[6] Pet. at 17-19.

[7] *See* Fed. Opp. at 12.

Section 312(a)(7) is supported by the Commission's contemporaneous construction of the statute in its brief to this Court in *CBS* v. *DNC*.[8] In addition, the report of the Senate Commerce Committee concerning Section 312(a)(7) makes clear that the obligation reflected in Section 312(a)(7) was already "inherent in the requirement that licensees serve the needs and interests" of the community of license. S. REP. No. 96, 92d Cong., 1st Sess. 34 (1971). The report stressed that the Commission under Section 312(a)(7) should "continue to consider" the extent to which broadcasters had satisfied their obligation under the public interest standard. *Id.* at 28.

Respondents ignore these statements, which provide the most direct congressional explanation of the purpose of Section 312(a)(7), and instead point again to a statement in the Senate report that one purpose of the Federal Election Campaign Act of 1971 was to provide "greater access" to the media for political candidates. *See* S. REP. No. 96, *supra*, at 20 . However, the quoted passage makes no reference whatever to Section 312(a)(7). It refers to other sections of the bill, such as a provision repealing Section 315 for Presidential and Vice Presidential campaigns, a section that was not even enacted.[9]

Indeed, the predominant purpose of the statute as a whole was not to increase the scope of political campaigns, but to shorten them and reduce what were viewed as excessive expenditures on media advertising.[10] The judgments that the broadcasters made in the present case were not only consistent with those Congressional policies but also were designed to ensure that all simi-

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[8] *See* Pet. at 19 & n.30.

[9] S. REP. No. 96, *supra*, at 21. The Report also referred to the "lowest unit charge" provisions now codified in Section 315(b), 47 U.S.C. § 315(b), and parallel provisions (never enacted into law) for non-broadcast media. *See id.*

[10] *See* S. REP. No. 96, *supra*, at 22-28; 117 CONG. REC. 28,813 (1971) (remarks of Sen. Prouty).

larly situated federal candidates received even-handed treatment in accordance with the broad policies of Section 315, rather than treatment based upon their own "individual needs." [11]

3. Respondents also minimize the important questions of the constitutionality of government-imposed systems of access to the broadcast media—questions that this Court in *Midwest Video*, *supra*, 440 U.S. at 709 n.19, recognized as substantial.

The Federal respondents point to Section 315 of the Act, which requires that broadcasters grant "equal opportunities" to candidates for public office, as establishing a constitutionally permissible "tradition" in favor of

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[11] Respondents now place great reliance on the supposed "plain language" of Section 312(a)(7). *See* Fed. Opp. at 10; CMPC Opp. at 4. In its initial decision, however, the Commission stated that the language of the statute provided little direction. 74 F.C.C.2d at 637, App. B at 78-80a. In any event, that language is equally consistent with an interpretation that all Congress intended to do in enacting Section 312(a)(7) was to provide the remedy of license revocation for "willful or repeated" failure to observe the existing public interest requirements.

Respondents also urge that a 1971 amendment to the second sentence of Section 315(a) somehow shows that Section 312(a)(7) was not "meant merely to codify pre-existing obligations". Fed. Opp. at 11 n.7; *see* CMPC Opp. at 5-6. In fact, the purpose of the amendment to Section 315(a)—which was adopted at the same time as Section 312(a)(7)—merely made clear that no obligation to sell time to candidates in the first instance was created "under this subsection [315(a)]," thus in effect reiterating the original language of the section which had stated that no obligation to sell time in the first instance had been created "hereby." *See* 48 Stat. 1064, 1088 (1934). While respondents urge that this clarification shows that Congress intended to create new affirmative rights of access under Section 312(a)(7), the amendment to Section 315(a) is equally consistent with the view that Congress in Section 312(a)(7) was merely codifying the policies concerning the sale of time to candidates that previously existed under the public interest standard. Moreover, the amendment to Section 315(a) confirms that Congress viewed affirmative access and contingent access to be quite different, and that Section 315(a) had nothing to do with affirmative access.

granting access in political matters, and suggest that Section 312(a)(7) is consistent with that policy.[12] In fact, Section 312(a)(7), as construed by the court of appeals, and Section 315 operate in radically different fashions. As construed, Section 312(a)(7) grants a right of access to an individual candidate, whether or not a broadcaster has made an initial decision to present the views of opposing candidates. Section 315, however, like the reply requirements of fairness doctrine sustained in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), comes into play only when a broadcaster has made an initial decision to broadcast a particular program. Section 312(a)(7), in the language of the court of appeals, creates an "affirmative" right of access, while Section 315 creates only a limited "contingent" right of access.[13] Although respondents seek to minimize these differences between rights of reply and initial rights of access, in the past they have been viewed as constitutionally significant.[14] This Court has never sustained an affirmative right of access imposed upon broadcasters.

Respondents also attempt to minimize the constitutional issues by contending that the "Commission's decision here involves no government review or abridgement of editorial discretion."[15] To the contrary, the decision, as with any system of access, in fact restricts the broadcaster's editorial judgment, a judgment that is important here in order to allow the broadcaster to balance the sale of time to political candidates with the broadcaster's

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[12] Fed. Opp. at 13-15.

[13] See App. A at 14a.

[14] In *CBS* v. *DNC*, this Court stressed that an affirmative right of access raised substantially greater dangers of intrusion than the "contingent" right accorded by the Commission's fairness doctrine. 412 U.S. at 126-27; *see also Midwest Video, supra*, 440 U.S. at 705 n.14.

[15] Fed. Opp. at 9.

own journalistic coverage and other programming. By making the needs of the individual candidate the determinative criterion and by permitting comprehensive Commission review of broadcaster judgments, the decision to a substantial degree divests the broadcaster of discretion to determine amount of time sold and the conditions under which those sales will be made and locates that power in the candidate and Commission.[16]

Finally, the Federal respondents suggest that the right of access established by the Commission's interpretation of Section 312(a)(7) is more limited than the one at issue in *CBS* v. *DNC* because it applies only to federal candidates.[17] The fact that only one class of speakers may command access to the media does not mitigate the inherent intrusive impact on broadcaster judgment. In contrast to *CBS* v. *DNC*, 412 U.S. at 131, there was nothing in *Midwest Video* suggesting that the Commission could permissibly adopt any kind of access system, even a "less intrusive" one. *See* 440 U.S. at 705 n.14. Under any access system, the governmental intrusion—

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[16] The Federal respondents' view to the contrary is apparently based on their suggestion that "[u]nlike a more open-ended general access scheme, Section 312(a)(7) leaves little room for disputes over, and resulting governmental oversight of, such initial issues as which speakers have access rights, which speakers are entitled to responsive time, and how time is to be made available." Fed. Opp. at 15. This case, of course, involves a dispute as to "how much time is to be made available," and turned on some rather refined distinctions. While the Commission in effect held that the offer of a half-hour was required, *see* 74 F.C.C.2d at 644, App. B at 90a-91a, *id.* at 674, App. C at 138-39a, the court suggested that an offer of 15 minutes might have been defensible, App. A at 37a, and CBS itself had originally offered the Carter Committee a total of ten minutes. *See* Pet. at 5. Commission decisions under Section 312(a)(7) since the decision in this case indicate that issues of "how much time is to be made available" will continue to arise with considerable frequency. *See, e.g., Ed Clark for President Comm.* (Broadcast Bur., Sept. 23, 1980); *Ed Noble For Senate Comm.* (Broadcast Bur., Aug. 20, 1980).

[17] Fed. Opp. at 15-16.

involving the necessity of determining "who should be heard and when" (*CBS* v. *DNC*, 412 U.S. at 127)—and the attendant dangers remain the same. Moreover, to favor one group of speakers—federal candidates—by granting preferential access rights may itself be constitutionally prohibited.[18]

4. The issues presented by this case are of profound practical importance to broadcasters, political candidates, and the public. The interpretation of Section 312(a)(7) adopted by the Commission, which requires a broadcaster, upon receiving a request from a candidate for federal office, to "tailor [its] response to the *individual* candidate," [19] has inevitably led to an increasing number of complaints to the Commission by candidates alleging failure on the part of the broadcasters to afford them "reasonable access." Indeed, as the Federal respondents admit, since the Commission's decision in this case, the Commission or its staff have issued eight decisions involving Section 312(a)(7).[20] Thus, contrary to the Federal respondents' assertions,[21] the effect of the decision below has been increasingly to draw the Commission into a "continuing case-by-case determination of who should be heard and when." *CBS* v. *DNC*, 412 U.S. at 127. Moreover, as Judge Tamm pointed out in his separate opinion, this continuing Commission review occurs in a highly sensitive political area where the fact or appear-

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[18] In *CBS* v. *DNC*, this Court rejected a contention by the Democratic National Committee that the Court should at least recognize a right of national parties to purchase time. This Court stated: "We see no principled means under the First Amendment of favoring access of organized political parties over other groups and individuals." 412 U.S. at 127 n.21.

[19] App. A at 39a-40a (emphasis in original).

[20] Fed. Opp. at 16 n.15. The Commission continues to issue such rulings. *See Ed Clark for President Comm.* (Broadcast Bur., Sept. 23, 1980).

[21] *See* Fed. Opp. at 16.

ance of Commission favoritism is a substantial constitutional danger:

> "We cannot ignore the fact that members of the Federal Communications Commission may have more than a passing interest in the outcome of Federal elections, particularly presidential contests. . . . Even if a Commissioner makes every effort to remain impeccable neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking." [22]

CONCLUSION

For the reasons stated above and in our petition for certiorari, the writ should be granted.

Respectfully submitted,

Of Counsel:

RALPH E. GOLDBERG
CBS Inc.
51 West 52 Street
New York, New York 10019

JOSEPH DEFRANCO
CBS Inc.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

October 3, 1980

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[22] App. at 63a-64a.

Nos. 80-207, 80-213, 80-214

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Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
American Broadcasting Companies, Inc.
1330 Avenue of the Americas
New York, NY 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2606

Counsel for Petitioner American Broadcasting Companies, Inc.

December 18, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

As interpreted by the Court of Appeals, Section 312 (a) (7) of the Communications Act empowers the Federal Communications Commission, first, to determine when a federal election campaign begins and, second, to impose upon broadcasters the obligations, reviewable by the agency, to entertain federal candidate requests for the purchase of political time from the beginning date of the campaign and to consider the campaign needs of individual candidates in the context of responding to such requests. The question presented is whether this interpretation is contrary to the purposes of the Communications Act, usurps the previously recognized discretion of broadcast licensees in the area of political programming, and interjects the FCC too deeply into the political process in violation of the First Amendment.

PARTIES BELOW

Petitioner American Broadcasting Companies, Inc. was a petitioner in the proceedings before the United States Court of Appeals for the District of Columbia Circuit, the court whose judgment is here under review. Other petitioners in the Court of Appeals were CBS Inc. and National Broadcasting Company, Inc. The Federal Communications Commission and the United States of America were the respondents below. Carter-Mondale Presidential Committee, Inc. and National Association of Broadcasters were intervenors below.*

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* American Broadcasting Companies, Inc. has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates. We understand the terms "parent companies," "subsidiaries," and "affiliates" to mean those corporations whose shares are publicly traded. A "parent company" is understood to be a corporation which owns a majority of the shares of another corporation. A "subsidiary" or "affiliate" is understood to be a corporation a majority of whose shares are owned by another corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-207, 80-213, 80-214

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 629 F.2d 1 and appears as Appendix A to the separate volume of appendices filed jointly by American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. to accompany the petitions for writs of certiorari. The opinions of the Federal Communications Commission are reported at 74 F.C.C.2d 631 (1979) and 74 F.C.C.2d 657 (1979) and appear as Appendices B and C, respectively.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1980. 629 F.2d 1, Pet. App. 2a. Timely

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* References to the Appendices volume submitted with the petitions for writs of certiorari are cited herein as "Pet. App. ——." References to the Joint Appendix filed simultaneously herewith are cited herein as "J.A. ——."

petitions for rehearing and suggestions for rehearing *en banc* were denied by the Court of Appeals on May 15, 1980. Pet. App. 152a-53a. On June 4, 1980, the time for filing a petition for writ of certiorari in No. 80-207 was extended to August 11, 1980 (Pet. App. 154a) and the petition in that case was filed on that date. The petitions for writs of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The petitions in all three cases were granted and the cases were consolidated by this Court in orders entered on November 3, 1980. J.A. 267-69. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 312(a)(7) and 315(a) and (b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(7), 315(a) and (b). While each of these constitutional and statutory provisions is set forth in an appendix (Pet. App. 155a-57a), the key statutory provision involved is Section 312(a)(7), which states as follows:

> "(a) The [Federal Communications] Commission may revoke any station license or construction permit—
>
> . . .
>
> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

STATEMENT OF THE CASE

A. Statutory Background

Faced with mounting pressure to address certain problems generated by rapidly escalating campaign costs, Congress undertook a number of initiatives in the late 1960's looking toward possible changes in the various

laws affecting campaign financing and political broadcasting. Although legislation was passed in 1970 that was partially responsive to these concerns,[1] the measure was vetoed by President Nixon because the Administration favored different or more comprehensive changes.[2]

This spirit of reform, however, continued into the next Congress and culminated in the Federal Election Campaign Act of 1971[3]—a measure that was signed into law on February 7, 1972. The Act consisted of four titles—three of which generally dealt with limitations on political contributions and expenditures, the disclosure of campaign funds, and a number of administrative practices connected with the election process. Title I, known as the Campaign Communications Reform Act, was the broadcast reform section of the law. It contained three significant provisions: (1) a provision which established that, during the 45-day period preceding a primary election and the 60-day period preceding a general or special election, broadcast stations could not charge a legally qualified candidate a rate in excess of their "lowest unit charge . . . for the same class and amount of time for the same period;"[4] (2) a provision that imposed certain spending restrictions on candidates for federal elective office in their use of communications media (further restricting to 60 percent the amount of total media expenditures that federal candidates could devote to the

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[1] S.3637, 91st Cong., 2d Sess. (1970). S.3637 would have permanently suspended the "equal opportunities" requirement of Section 315(a) of the Communications Act for Presidential campaigns, established a ceiling on the amount of money candidates for federal or gubernatorial office could spend on radio and television, and required broadcast stations to charge candidates their lowest unit rate for comparable commercial time.

[2] S. Doc. No. 109, 91st Cong., 2d Sess. 1 (1970).

[3] Pub. L. No. 92-225, 86 Stat. 3 (1972) [hereinafter FECA of 1971].

[4] FECA of 1971, § 103(a)(1), 47 U.S.C. § 315(b).

broadcast media);[5] and (3) a provision that empowered the Federal Communications Commission to revoke a broadcast station license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office."[6] The last of these provisions was codified as Section 312(a)(7) of the Communications Act and is the focal point of this litigation.

B. The Commission's Early Interpretation of Section 312(a)(7)

On March 16, 1972 the Commission issued a public notice containing new interpretive guidelines specifically directed to the provisions of Title I of the FECA of 1971.[7] With respect to Section 312(a)(7), the Commission's principal pronouncement took the following form:

> Q. How is a licensee to comply with the requirement of section 312(a)(7) that he give reasonable access to his station to, or permit the purchase of reasonable amounts of time by, candidates for Federal elective office?
>
> A. . . .
>
> Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most

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[5] FECA of 1971, § 104. This provision was repealed on October 15, 1974, by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 205(b), 88 Stat. 1278.

[6] FECA of 1971, § 103(a)(2)(A), 47 U.S.C. § 312(a)(7).

[7] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510 (1972).

> time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.[8]

For the next six years the foregoing interpretive principles were applied on a case-by-case basis. Then, in 1978 the Commission undertook its first public proceeding concerning the administration of Section 312(a)(7). *Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079 (1978) [hereinafter 1978 *Report and Order*]. The 1978 *Report and Order* remains the Commission's most comprehensive statement of its policies and practices under Section 312(a)(7).

While the 1978 *Report and Order* found that Section 312(a)(7) imposed "a different, additional obligation" applicable to federal candidates that went beyond a broadcaster's responsibility to provide time generally to political candidates under the public interest standard,[9] the Commission ultimately concluded that it would continue "to rely on the reasonable, good faith discretion of individual licensees" in evaluating Section 312(a)(7) complaints.[10] In particular, the Commission reaffirmed its longstanding position that "[i]t is best left to the discretion of a licensee when and on what date a can-

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[8] *Id.* at 536.

[9] 68 F.C.C.2d at 1088. In this regard, the Commission could "see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts." *Id.*

[10] *Id.* at 1089 (footnote omitted).

didate's spot announcement or program should be aired." *Id.* at 1091. Although the Commission prohibited "arbitrary 'blanket' ban[s]" on the use of a "particular class or length of time in a particular period," the Commission believed that this policy would not "in any way disrupt a station's broadcast schedule," and that it would "result in little practical change in the political broadcast policies of most licensees who already afford Federal candidates their full complement of broadcast times." *Id.* at 1090-91.

C. The Carter-Mondale Committee's Request

By letters dated October 11, 1979, Gerald M. Rafshoon, President Carter's media adviser, acting on behalf of the Carter-Mondale Presidential Committee, Inc. (the "Committee"), sought to purchase from ABC and the other two major television networks one half-hour of time between 8:00 p.m. and 10:30 p.m., EST, on December 4, 5, 6 or 7, 1979. J.A. 35-40. The letters stated that the Committee intended to present "a documentary outlining the President's record and that of his administration" and that the program would "be run in conjunction with an announcement concerning [the President's] candidacy." J.A. 35, 37, 39.

In a letter dated October 23, 1979, ABC advised Mr. Rafshoon that it could not comply with the Committee's request for time on one of the early December dates, but that it expected to make time available early in 1980. J.A. 41.[11] CBS and NBC also declined to offer Mr. Rafshoon the requested time.

D. Proceedings Before The Commission

1. *The Committee Complaint*

On October 29, 1979, the Committee filed a complaint with the Commission alleging that the three networks

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[11] ABC subsequently advised the Committee and the Commission that it would make time available during the first week of January, 1980.

had denied the Committee reasonable access as required by Section 312(a)(7) and asking the Commission to "direct the networks to make time available for purchase" on the dates requested. J.A. 27, 33.

In response, ABC explained the factors which had led it to conclude that political time sales could reasonably commence in early January, 1980—instead of on the specific dates requested. Thus, the first of 36 Presidential primaries was, at that time, nearly four months away and the Democratic National Convention was more than eight months away. J.A. 54-55. ABC also noted that the potential for program schedule disruption would be considerable if the Committee were sold time in early December, as multiple candidates would likely assert equal opportunities rights under Section 315(a) of the Communications Act. J.A. 56. In this regard, ABC observed that at least nine Republicans had already declared their candidacy and that two Democratic leaders and a tenth prominent Republican were expected to announce within a short period of time. Finally, ABC emphasized that its continuing news coverage ensured that "the mixture of issues, developments (including candidate announcements) and personalities that dominate this early stage of the campaign are brought to the public's attention." J.A. 57.

2. *The Commission's Initial Memorandum Opinion and Order*

On November 20, 1979, a sharply divided (4-3) Commission held that all three networks had denied the Committee reasonable access under Section 312(a)(7), and directed the networks to formulate plans for immediate compliance. 74 F.C.C.2d 631, Pet. App. 69a.

In particular, the Commission faulted all three networks for an alleged failure to consider the specific needs of President Carter in evaluating the Committee's request for time. According to the Commission, the networks had not given sufficient consideration to the

fact that the proposed program was intended to "set the tone for the President's entire campaign and that this purpose [could not] be accomplished at a later date." *Id.* at 644, Pet. App. 91a. In this context, the Commission observed that its 1978 *Report and Order* had "placed particular emphasis on the candidate's needs." *Id.* at 642, Pet. App. 87a. After conducting an independent review of certain general campaign activities,[12] and reasoning therefrom that the 1980 Presidential campaign was then "in full swing," the Commission ultimately concluded that it was not too early to begin political time sales. *Id.* at 646-47, Pet. App. 94a.

In a Separate Statement, Commissioner Quello, whose vote was critical to the 4-3 decision, said that the "fundamental issues" raised by the case were "particularly difficult to resolve" "because they require the FCC to make some very subjective judgments in the emotionally-charged atmosphere of a political campaign." [13]

In dissent, Commissioner Washburn focused specifically on ABC's response to the Committee, concluding that "[a] one-month delay in this instance is not clearly unreasonable." *Id.* at 654, Pet. App. 107a. In Commissioner Washburn's view the "most troublesome" issue raised by the case was "the question of the FCC's in-

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[12] Among the activities or developments informally surveyed were the following: (1) candidacy announcements, (2) the establishment of national campaign organizations, (3) fund raising activities, (4) endorsements, (5) media coverage, and (6) the general progress of delegate selection. *Id.* at 645-46, Pet. App. 92a-93a.

[13] *Id.* at 654, Pet. App. 107a. During the Commission's November 20, 1979 open meeting in this case, this same Commissioner stated: "I hate to say the networks are unreasonable; I think maybe they had good reasons for opposing [the Committee's request]." J.A. 140. He could not, as a factual matter, find ABC's "one-month delay" to be "unreasonable." J.A. 145. Although it was a "very close call," he ultimately "disagree[d] with the conclusions of the networks." J.A. 140. During this same meeting, Commissioner Brown said that ABC's response made for a "very, very close case." J.A. 151.

terfering with the discretion of the broadcasters and substituting [the FCC's] judgment for theirs." "The proposition which [this] decision will stand for is that the candidate's own determination of his needs is overriding. The consequences of this precedent will rise to haunt the Commission and the public in future campaigns." *Id.*, Pet. App. 106a.

Commissioner Jones dissented on the grounds that "the facts of this case" did not provide "a clear showing that the networks have acted in an unreasonable manner." *Id.*, Pet. App. 107a. Also in dissent, Commissioner Lee termed the action "a serious abuse of the Commission's discretion," representing a major and unwise change in the law. *Id.* at 653, Pet. App. 105a.

3. *The Commission's Decision On Reconsideration*

The Commission's initial decision was released on November 21, 1979. On November 23, 1979, the next business day, all three networks petitioned for a stay and reconsideration of that decision.

In denying these petitions, the Commission rejected contentions that its initial *Memorandum Opinion and Order* had placed undue emphasis on the importance of candidate needs as a factor to be weighed in evaluating Section 312(a)(7) requests. The Commission did acknowledge, however, that its original decision "may not have fully explained the manner in which [the FCC] expect[s] licensees to weigh individual requests for reasonable access." 74 F.C.C.2d at 666, Pet. App. 125a. Thus, while stating that a broadcaster might properly consider such factors as program schedule disruption and candidate multiplicity, the Commission held that a broadcaster must "demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the

airtime." [14] Furthermore, the Commission found that "the candidate's initial request of a campaign carries an air of reasonableness to it." [15] The decision also made clear that the Commission, not broadcasters, would decide on the basis of "objective" criteria when an election campaign was in full swing, thereby triggering reasonable access obligations. *Id.* at 666, Pet. App. 124a.

Commissioners Jones, Lee, and Washburn again dissented. Commissioner Lee summarized the Commission's action: "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time." *Id.* at 681, Pet. App. 149a-50a (footnote omitted).

E. The Decision Of The Court of Appeals

On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit, consisting of Judge Markey, sitting by designation from the United States Court of Customs and Patent Appeals, Circuit Judge Tamm, and Senior Circuit Judge Bazelon, affirmed the Commission decisions.[16] In an opinion written by

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[14] *Id.* at 668, Pet. App. 128a. In this regard, while the Commission denied any intent to "requir[e] broadcasters to make an assessment of individual candidate 'needs' insofar as they solely relate to the candidate's subjective, personal, or immediate 'political' desires," *id.* at 667, Pet. App. 127a, the Commission also concluded that broadcasters must "take into account" the fact that a candidate has requested "an opportunity to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests." *Id.* at 668, Pet. App. 128a.

[15] *Id.* at 667, Pet. App. 127a. Commissioner Brown, concurring in the 4-3 decision, indicated in a Separate Statement that a candidate's first request could be denied only for "compelling" reasons. He could think of "few (if any)" such reasons. *Id.* at 679, Pet. App. 146a.

[16] The Commission's orders directing immediate compliance were stayed by the Court of Appeals pending review. The Committee subsequently withdrew its original request for a half-hour of time

Judge Bazelon, the court declared that Section 312(a)(7) created an affirmative right of access for individual candidates for federal elective office. In so ruling, the Court of Appeals characterized this Court's statement in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12 (1973) [hereinafter *CBS* v. *DNC*] that Section 312(a)(7) had "essentially codified" prior Commission standards, as "*dictum* [that] strayed far from what was before the Court" and was, therefore, "not controlling here." 629 F.2d at 13, Pet. App. 20a-21a.

The Court of Appeals went on to affirm the Commission's "right to decide when in the campaign the access rights . . . attach." *Id.* at 17, Pet. App. 29a. Although acknowledging that "the Commission's pronouncements on this point have lacked the clarity that facilitates review," *id.* at 15, Pet. App. 25a, the court nonetheless reasoned that the orders could be reconciled with precedent.[17] The court also concluded that a determination of when access rights attach is "an objective, noneditorial judgment for which the Commission is better suited than either broadcasters or candidates," and one for which the Commission had established "reasonable" indicia to be used in its campaign-by-campaign approach. *Id.* at 17, Pet. App. 29a.

While observing that the test of reasonableness should be measured from the perspective of the broadcaster's *offer*, not the candidate's *request*, *id.* at 17-18, Pet. App. 30a, the Court of Appeals concluded that broadcasters must supply a "full explanation" of their decisions, ad-

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during the December 4-7, 1979 period because of developments related to the seizure of American Embassy personnel in Iran. The Committee purchased five minutes of time from CBS on December 4, 1979 and one half-hour from ABC on January 6, 1980. *See* 629 F.2d at 9; Pet. App. 11a.

[17] In this regard, the court remarked that the 1978 *Report and Order* "seems to have assumed that the 'question of when' was addressed to the FCC." *Id.* at 16, Pet. App. 26a.

verting, whenever relevant, to the five factors identified by the court.[18] The first factor, "the individual needs of the candidate (as expressed by the candidate)," is deserving of "special weight," according to the court's interpretation of Commission precedent. *Id.* at 19, Pet. App. 33a. With respect to the other four factors, the court explained that: (1) the amount of time previously provided a candidate only becomes relevant after the first request is granted, *id.* at 20, Pet. App. 36a-37a; (2) the potential disruption of the broadcaster's regular programming has to be "substantial" and takes on real significance only in the closing days of a campaign, *id.* at 21, Pet. App. 37a; (3) candidate multiplicity "*might* justify denying *or, more likely, limiting* a request for time," *id.*, Pet. App. 38a (emphasis added); and (4) the lack of reasonable notice could allow a broadcaster to deny a request in only rare instances (i.e., only a few days' notice given). *Id.*, Pet. App. 38a.

The opinion also held that the Commission's implementation of Section 312(a)(7) was a "constitutionally acceptable accommodation" of the rights of the public, candidates, and broadcasters.[19]

Finally, the court agreed with all of the parties in the case that the appeal was not moot simply because the Committee had purchased time from CBS in December and ABC in January.[20] Rather, the court regarded the

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[18] *Id.* at 21, 23, Pet. App. 38a, 41a. In its decisions, the Commission had consistently referred to *three* relevant "factors" to be applied in evaluating candidate requests—candidate needs, candidate multiplicity, and the availability of classes of time. *See, e.g.*, 74 F.C.C.2d at 642, Pet. App. 87a. After reviewing the *five* factors it considered critical, the Court of Appeals acknowledged that "the agency failed to headline its policy as clearly as it might have." Elaborating on this point, the court further stated that "[i]f an agency intends to demand that regulated companies consider and address all relevant factors, it must be clear and consistent in articulating those factors." 629 F.2d at 23, Pet. App. 42a.

[19] *Id.* at 25, Pet. App. 47a.

[20] See note 16 *supra*.

case as fitting squarely within the *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911) line of cases holding that short-term administrative orders "capable of repetition, yet evading review" should be reviewed and not dismissed as moot. *Id.* at 27-28, Pet. App. 52a-54a.

In a concurring opinion, Judge Tamm voiced concern that the Commission had "come perilously close to falling into the chasm of impermissible government action." *Id.* at 34, Pet. App. 68a. He emphasized that "the danger of nonneutral government decisionmaking raises grave first amendment concerns," *id.* at 29, Pet. App. 56a, which are "exacerbated by the Commission's emphasis . . . on the 'individual needs' of the candidate." *Id.* at 32, Pet. App. 62a. Judge Tamm was particularly concerned about the risk of partiality in this case because "the principle of neutrality is at its zenith in the context of political speech." *Id.* at 31 n.8, Pet. App. 60a-61a n.8.

SUMMARY OF ARGUMENT

The indisputable focal point of this case is Section 312(a)(7) of the Communications Act, a provision that was enacted in the early 1970's as part of a comprehensive legislative effort to reassess federal laws affecting campaign financing and political broadcasting. It provides that the Commission may revoke a broadcast station license "for willful or repeated failure to allow reasonable access" to candidates for federal elective office. It was adopted against the background of an overall statutory scheme and longstanding Commission policy that made clear that although broadcasters were required to make their facilities available for use by political candidates, they were afforded substantial discretion in meeting this responsibility.

The interpretation placed on Section 312(a)(7) by the Court of Appeals substantially disturbs this carefully balanced approach, refined over a period of more than fifty years by the Congress, the Commission and this Court. It empowers the Commission to "legally" deter-

mine when a federal election campaign begins for the purpose of deciding when a broadcaster must first entertain requests for the sale of political time—no matter how long before the relevant election. And it requires broadcasters to assess the individual "needs" of federal candidates in the context of responding to their requests for political time—and then permits the Commission to reassess those needs in a detailed case-by-case review.

As we demonstrate, this dramatically different approach to political broadcasting, whereby the broadcaster's editorial discretion is virtually eviscerated in favor of recurring Commission oversight, creates a regulatory scheme that goes well beyond the legislative purpose of Section 312(a)(7) and conflicts with other important policies of the Communications Act and the First Amendment.

I.

By its literal and conspicuous terms, Section 312(a)(7) confirms a *general* right of broadcast access for legally qualified candidates for federal elective office. It manifestly fails to provide the terms and conditions of such access, incorporating, instead, only a concept of reasonableness—i.e., providing a remedy only where a station "willfully or repeatedly" fails to allow "reasonable amounts" of broadcast time. Accordingly, the addition of Section 312(a)(7) to the Communications Act was intended, as this Court has indicated, to essentially "codif[y] the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates." *CBS* v. *DNC*, 412 U.S. at 113-14 n.12 (citations omitted).

The interpretation by the Court of Appeals not only comprehends obligations and conditions that far transcend the plain statutory language, it produces practical results that frustrate rather than enhance the principal legislative goals surrounding enactment of Section 312(a)(7). Thus, although Congress sought in the Federal

Election Campaign Act of 1971 both to shorten political campaigns and to reduce their rapidly escalating cost, the interpretation below greatly extends the potential length and the corresponding cost of media campaigning.

Of equal importance, the lower court's characterization of the statutory language and its misreading or avoidance of the relevant legislative history have the effect of virtually destroying the longstanding and deeply ingrained tradition of affording broadcasters substantial editorial discretion in selecting when and under what conditions to initiate political time sales. Thus, even though the Commission, with Congressional approval, has long held that broadcasters are under an obligation to make their facilities available for use by political candidates, heretofore this Commission policy has permitted broadcasters substantial discretion in deciding when political programming should be initiated, and encouraged broadcasters to treat all candidates in a given election on an evenhanded rather than individual basis.

This tradition in the political broadcast area is fully consistent—indeed mandated—by other policies or provisions of the Communications Act. For instance, one of the most important features of the Communications Act is its rejection of a common carrier approach for broadcasting, favoring instead a system permitting broad journalistic freedom and discretion for broadcast licensees, subject to ultimate public accountability. Moreover, Section 326 of the Communications Act—which expressly prohibits Commission censorship of broadcast material—similarly "evince[s] a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109. This basic statutory approach was also carried out in the principal political broadcasting provision of the statute (Section 315) which, *inter alia*, requires broadcasters to grant "equal opportunities" to opposing candidates when a broadcaster

makes an *initial* determination to grant or sell broadcast time to a political candidate.

These policies—which have been adhered to for more than fifty years of broadcast regulation—were effectively ignored in the lower court's opinion. The decisions in this case substantially depart from prior law in the political broadcasting area in general and earlier Commission interpretations of Section 312(a)(7) in particular. Under that pre-existing law, broadcasters were afforded substantial discretion in responding to political time requests and the governing standard was a "test of reasonableness." That standard—even though incorporated in the precise language of Section 312(a)(7)—has now been effectively read out of the statute.

II.

The new Commission standards endorsed by the Court of Appeals for implementing Section 312(a)(7) will also intrude upon broadcaster First Amendment rights and thrust the government too deeply into the partisan political process. By interpreting Section 312(a)(7) to require the initiation of specific programming within a narrowly defined time period under the threat of severe Commission sanction, the Court of Appeals decision threatens to upset the delicately balanced system of broadcast regulation specifically engineered by Congress and previously upheld by the courts to accommodate the First Amendment rights of broadcasters with other recognized needs of the statutory scheme.

Of equal significance, broadcaster discretion has been effectively preempted by a new and substantial involvement by the Commission in the partisan political process. Permitting the government to exercise active oversight in how broadcast facilities are to be used and for what specific political purposes is not only at odds with the principle of licensee discretion embedded in the Communications Act, but also places the government in an unacceptable political role.

The constitutional principle that demands neutrality in government decisionmaking, of particular importance in the context of political speech, is gravely threatened by the new standards laid down in this case—standards that stress the individual needs of candidates and make the determination as to when federal election campaigns begin for purposes of broadcast time sales a "legal" judgment of the Commission. Unlike the regulatory approaches exemplified by the fairness doctrine and the personal attack/political editorial rules upheld by this court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the newly sanctioned standards under Section 312(a)(7) permit agency review and implementing orders even though the broadcaster has made no initial choice in the presentation of particular program material.

In sum, by effectively usurping any meaningful licensee discretion and failing to recognize the dangers of interjecting the Commision too deeply into the political process when candidates seeking federal office request broadcast time, the decision in this case violates important constitutual principles.

ARGUMENT

Introduction

This case involves novel and highly sensitive issues bearing upon the government's carefully circumscribed role in the partisan political process, and the statutory and constitutional protections afforded the editorial judgments of broadcast licensees. It centers on Section 312(a)(7) of the Communications Act of 1934, as amended, which provides that the Commission may revoke a station license "for willful or repeated failure to allow reasonable access" to candidates for federal office. The construction placed on that statutory provision by the court below gives the provision a meaning that was unintended by Congress, that unduly restricts the discretionary judgment broadcasters have heretofore been permitted to exercise in allocating time to federal candidates, and that

impermissibly casts the Commission in the central role of supervising political programming—i.e., deciding which candidates should be heard, to what extent and when. The fundamental question presented is whether the Commission should be permitted to intrude so deeply into this process—sitting as the ultimate arbiter of when the sale of political time must begin and requiring broadcasters, subject to agency review, to assess the campaign "needs" of individual candidates.

The statutory and constitutional questions presented are critically important to all broadcast stations and affect all federal elections. If permitted to stand, the guidelines announced by the Commission and refined by the Court of Appeals will permanently and perniciously reshape the entire political broadcasting landscape. Instead of a system whereby political access to the broadcast medium is governed by the statutory touchstone of overall reasonableness, increasing reliance on a standard requiring an evaluation of individual candidate needs will inevitably produce a system that specializes in arbitrariness (laced with partisan political overtones).

While the decisions below plainly foreshadow a drastic transformation in the respective roles of broadcasters, candidates and the Commission, it must be emphasized that this case does not involve questions relating to the adequacy of radio and television coverage of political campaigns. In fact, the complaining candidate in this case was the incumbent President, whose regular access to the broadcast media is unparalleled.

Similarly, this case does not involve the denial of a candidate's request to purchase time to present his views in a manner of his own choice. As early as November 5, 1979, ABC indicated its willingness to sell time to the Committee in January, 1980, and the half-hour program requested by the Carter-Mondale Committee was, in fact, broadcast by ABC on January 6, 1980—more than six months before the first Presidential nominating conven-

tion and nearly ten months before the November 4, 1980 general election.[21]

Rather, this case involves the precise conditions of such access and the standards imposed by the Commission, and upheld by the Court of Appeals, to insure that such conditions are satisfied. The pivotal issue is not whether President Carter's campaign received adequate coverage throughout the 1980 Presidential Election, or whether the Carter-Mondale Committee was actually afforded early and frequent access to ABC and the other national networks, but whether ABC, CBS and NBC were unreasonable in declining to sell a half-hour of time to the Carter-Mondale Committee during the first week of December, 1979. In essence, since the access requested was, in fact, granted several weeks later (pursuant to an ABC decision concerning the commencement of political time sales announced *prior* to the Commission's decisions), the basic question can be narrowed down to the rationale and policy for finding ABC unreasonable by four weeks in a national campaign that was nearly a year from completion.

The decision below mandates "access" without regard to the critical statutory caveat of "reasonableness." Like the Commission, the Court of Appeals viewed a week in December in isolation, declaring that a refusal to sell in that week represented a "flat ban" that was unreasonable. Although both the court and the agency have sought to cast this decision within the bounds of "objective" standards, such standards, in practice, defy objective implementation.

Such standards, in fact, thrust the Commission into a "continuing, case-by-case determination of who should be heard and when." *CBS* v. *DNC*, 412 U.S. at 127. A new

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[21] The Committee also requested and received a five-minute program on CBS on December 4, 1980.

system is created that not only transcends any requirements of the statute, but places the Commission at center stage in a highly charged political process. By fashioning standards that require the Commission repeatedly to assess the weight that should be afforded to the needs of individual candidates, and the adequacy of broadcaster responses to those needs, the decisions below create a regulatory scheme that goes beyond the legislative purpose of Section 312(a)(7) and conflicts with other important policies of the Communications Act and the First Amendment.

I. THE INTERPRETATION OF SECTION 312(a)(7) BY THE COURT OF APPEALS IS CONTRARY TO THE LEGISLATIVE PURPOSE OF THAT PROVISION AND CONFLICTS WITH OTHER FUNDAMENTAL POLICIES OF THE COMMUNICATIONS ACT

The decision below significantly alters the relationships of candidates, broadcasters and the Federal Communications Commission in the allocation of broadcast time for political purposes. Even though Section 312(a)(7) speaks in qualified and general terms (i.e., "*reasonable* access"), the court below has interpreted the statutory language in a manner that permits the Commission to effectively mandate broadcast sales based on its own exclusive determination of when a political campaign has begun. As we demonstrate below, this conflicts with the legislative history of Section 312(a)(7) and important policies of the Communications Act.

A. The Interpretation Contravenes Both The Plain Meaning Of The Statutory Language And Its Relevant Legislative History

Set apart from the main political broadcasting provisions of the Communications Act,[22] Section 312(a)(7)

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[22] Sections 315(a) and (b) of the Act, 47 U.S.C. §§ 315(a) and (b).

is contained in the Act's administrative remedies section and permits the Commission to "revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7).

By its literal and conspicuous terms, ABC believes Section 312(a)(7) confirms a *general* right of broadcast access for legally qualified candidates for federal elective office. It manifestly fails to provide the terms and conditions of such access, incorporating, instead, only a concept of reasonableness—i.e., providing a remedy only where a station "willfully or repeatedly"[23] fails to allow "reasonable amounts" of broadcast time.[24] As this Court observed in *CBS* v. *DNC*, the amendment adopting Section 312(a)(7) was intended to "essentially codif[y] the Commission's prior interpretation of Section 315(a)

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[23] The conventional "willful or repeated" language not only emphasizes the penalty aspect of the provision, but provides a further indication that Congress intended to place a broadcaster's license in jeopardy *only* if the denial of access was complete—i.e., "repeated" and consistent throughout a given campaign—not to provide an actionable remedy based on differences of a week or month, as here, in a campaign that extends over many months.

[24] Subsequent to the decision under review, the Court of Appeals for the District of Columbia Circuit ruled that Section 312(a)(7) does not require a broadcaster to make available free time to a candidate when the broadcaster offers to sell time. *Kennedy for President Committee* v. *FCC*, Case No. 80-1549 (D.C. Cir. May 31, 1980, opinion filed, August 6, 1980). This reading of the statute is not only consistent with its plain meaning, but provides further support, we submit, for the discretionary element or standard of reasonableness intended by the provision.

as requiring broadcasters to make time available to political candidates." [25]

Nonetheless, the Court of Appeals placed considerable stress on that portion of the language in Section 312(a)(7) referring to a federal candidate's use of a broadcasting station "on behalf of *his* candidacy," and thereupon contrasting this with, what it said, was previous Commission policy that did not give attention to *individual* candidates. 629 F.2d at 11-12, Pet. App. 15a-16a. While Section 312(a)(7) does, indeed, single out federal candidates, the language highlighted by the Court of Appeals does not support the conclusion that this created an individualized access right in the fashion dictated by the holding below.

In this regard, it is noteworthy that even though the language of Section 315 refers to the use of a broadcast station by *any* candidate,[26] the rights and obligations thereunder are typically asserted and administered by the Commission as to *individual*, legally qualified can-

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[25] 412 U.S. at 113-14 n. 12, citing *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959) and FCC Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time, Hearings before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90. In *Farmers Union*, this Court emphasized that a broadcaster policy that "den[ied] all candidates use of stations would . . . effectively withdraw political discussion from the air," in clear contravention of Congressional intent. 360 U.S. at 534. Moreover, the FCC Memorandum cited by the Court interpreted Section 315(a) and the public interest standard as requiring a broadcaster to provide time generally to political candidates.

[26] The Court of Appeals also suggests that the very fact that 315(a) encompasses all candidates, and 312(a)(7) singles out federal candidates, is itself further evidence of a new individualized access right for federal candidates. In our view, this distinction in the two statutory provisions merely shows that a *general* right was codified for *federal* candidates—*not* any other candidates.

didates.[27] Thus, it can be argued that all political broadcasting provisions are effectively applicable to *individuals* who demonstrate that they are legally qualified candidates and assert rights on behalf of *their* candidacies. This does not, however, begin to resolve the questions involved in this case—i.e., when and under what conditions political time sales must commence.

On its face, therefore, Section 312(a)(7) does not change the conditions of access. It merely codifies a *general* right of access as to federal candidates. That is why, we believe, this Court previously saw fit to characterize Section 312(a)(7) as essentially codifying a pre-existing general station *obligation* to provide access—the reciprocative of a general right of federal candidates to *obtain* access.

1. *The Interpretation Frustrates The Principal Legislative Goals Underlying The Federal Election Campaign Act of 1971*

The new gloss the decision below puts on Section 312(a)(7) takes that provision well beyond any expressed statutory intent. Contrary to the purposes of the general legislative framework in which it was enacted, Section 312(a)(7) has now been interpreted so as to *extend* an election media campaign to more than seven months before the first nominating convention and eleven months before the general election.

For instance, even though the legislative history of Section 312(a)(7) is limited, it is clear that a major purpose of the 1971 Federal Election Campaign Act was to shorten rather than extend the period for election campaigns. Thus, in adopting the "lowest unit charge"

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[27] It should also be observed that Section 315(b), which defines certain broadcast media rate limitations, speaks in terms of such rate provisions being applicable to *any* legally qualified candidate's campaign for *any* public office "in connection with *his* campaign for nomination for election, or election, to such office. . . ." 47 U.S.C. § 315(b) (emphasis added).

provision, Congress also established certain restrictive time periods during which the new rates would apply—45 days prior to a primary election and 60 days prior to a general election.[28] By so limiting the applicability of the lowest unit charge provision, Congress intended to provide an incentive to candidates to shorten their media campaigns and thereby reduce campaign costs. See S. REP. No. 92-96, 92d Cong., 1st Sess. 28 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1773, 1781. On this point, Senators Prouty, Cooper and Scott observed that "[e]veryone agrees that political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." S. REP. No. 92-229, 92d Cong., 1st Sess. 118 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1821, 1855.

The decision below effectively eviscerates the Congressional goal to shorten election campaigns by focusing on the earliest expression of individual candidate needs, and by giving the Commission the exclusive *ad hoc* power to judge whether particular federal election campaigns have begun. Indeed, the standards sanctioned in this case practically invite an even earlier start for the next national election—to say nothing of other federal elections. Such results flatly contravene the specific purposes of the 1971 Federal Election Campaign Act[29] and the generally acknowledged public interest in reducing both the length and the cost of political campaigns.[30]

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[28] FECA of 1971, § 103(a)(1), 47 U.S.C. § 315(b).

[29] See S. REP. No. 92-96, *supra*, at 20-22, 30-32, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1774-76, 1783-86, making clear that Congress intended not only to shorten the length of campaigns, but to reduce the media and other costs of such campaigns.

[30] *See, e.g., Voters Demanding Shorter Campaigns, Less Mud,* Washington Post, Nov. 23, 1980, at A33, col. 1 (reporting the results of a recent Gallup poll); *Sloan Group Planning Presidential Campaign Study,* N.Y. Times, Dec. 7, 1980, at 69, col. 1.

In a similar vein, Congress was also especially mindful of the problem of incumbents taking unfair advantage of greater media exposure. Thus, as explained by Senators Scott and Mathias (co-sponsors of S. 956, one of the Senate bills under consideration at the time of Section 312(a)(7)'s adoption):

> "Our bill . . . requires that broadcasters may not refuse to sell 'reasonable' amounts of political broadcast time to all legally qualified candidates for public office. While we recognize the pitfalls in employing the word 'reasonable', we wish to make clear our intent. We want to assure that those few broadcasters who happen to favor incumbent candidates cannot continue to do so by forbidding the sale of time to the opposition as well." [31]

Contrary to this additional legislative concern, the court below has rendered a decision that permits, even encourages, wealthy candidates to launch their media campaigns as early as possible in order to strike a knockout punch against less well-financed opponents.[32]

2. *The Interpretation Undermines Congress' Intent To Preserve, Not Supplant, Licensee Discretion In The Political Broadcasting Area*

The proposal that ultimately became Section 312(a)(7) first appeared in a different form in one of three companion bills introduced and considered simultaneously. See S.956, 92d Cong., 1st Sess., § 302(d) (1971); *Hearings*

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[31] *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 348 (1971) [hereinafter *Hearings on S.1, S.382, and 956*].

[32] In recently announcing the commencement of a comprehensive study of Presidential campaigns, representatives of the Alfred P. Sloan Foundation indicated that one of the principal criticisms of current campaign practices is the increasing tendency to eliminate able candidates at early stages. See *Sloan Group Planning Presidential Campaign Study, supra.*

on S.1, S.382 and S.956, supra, at 133. Two concepts were interspersed in those three bills that, although never adopted, serve to explain the limited action the Congress intended by Section 312(a)(7).

The first of these was the proposed repeal of the "equal opportunities" provision of Section 315(a). During the hearings leading to the 1971 legislation, much concern was expressed that the "equal opportunities" provision often resulted in limiting rather than enhancing political broadcast time. *See, e.g.,* S. REP. NO. 92-96, *supra,* at 26, 34, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1779, 1787. Reflecting this concern, Title I of S.382 as passed by the Senate contained an exemption from the "equal opportunities" requirements of Section 315(a) for the offices of President and Vice President.[33] However, the House version of the same bill did not include such a provision, and the Conference Committee elected to follow the House approach. S. CONF. REP. NO. 92-580, 92d Cong., 1st Sess. 21 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 1866-67.

Given this background, it is likely that the original impetus for Section 312(a)(7) was simply to counterbalance the anticipated repeal of the "equal opportunities" provision. It is natural to assume that some concern might have existed that a repeal of the "equal time" provision would represent a signal to broadcasters that they could reduce or eliminate the amount of time devoted to certain kinds of political programming (as contrasted with their overall political campaign coverage).[34]

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[33] It was during consideration of Title I of S.382 that the same Senate Commerce Committee added language now codified in Section 312(a)(7). See p. 28 *infra.*

[34] For example, it is especially likely that there may have been particular concern that stations would simply provide certain amounts of free time and not permit candidates to purchase addi-

Since such a concern is both likely and understandable, the origin of Section 312(a)(7) as essentially a measure to guard against such a result is at least one of the predominant themes interwoven in the overall legislative fabric.[35]

Thus, we find committee language that stresses the fundamental public interest obligation of broadcasters—previously defined by the Commission—to make their facilities available for political programming. Illustrative is the following excerpt from Senate Report No. 92-96:

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should continue to consider the extent to which each licensee has satisfied his obligation in this

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tional amounts of time. In this sense, it is worth recalling that the language of Section 312(a)(7) emphasizes the requirement to "*permit purchase* of reasonable amounts of time" (emphasis added).

[35] It is also important to recall and emphasize at this point that the same legislative package that produced Section 312(a)(7) contained a provision that specifically limited the amount of money candidates running for *federal elective office* could spend for the use of certain enumerated communications media (broadcast stations, newspapers, magazines, outdoor advertising and telephones), and the percentage of such expenditures they could devote to the *broadcast* media. FECA of 1971, §§ 102(1), 104(a)(1). See pp. 3-4 *supra*. Having so limited the communications and broadcast media expenditures of federal candidates, it is not surprising that Congress perceived a need to ensure that federal candidates received "reasonable access" to the broadcast medium. Thus, new restrictions on spending would certainly explain a concern on the part of federal legislators that federal candidates not be denied any *existing* rights and privileges in their use of the broadcast medium. Furthermore, it is highly unlikely that Congress would have so carefully set out to limit campaign costs and simultaneously fashioned in Committee a provision (Section 312(a)(7)) with the potential for increasing significantly the length (and attendant expense) of campaigns.

> regard in connection with the renewal of his broadcast license. Certainly no diminution in the extent of such programming should result from the enactment of this legislation.
>
> "In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S.382 contains an express provision to this effect." [36]

It was in this broader context, therefore, that the Senate Committee on Commerce explained the specific addition of Section 312(a)(7):

> "Section 101(c) [the current "reasonable access" provision] was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a lagally [*sic*] qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
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> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests

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[36] S. REP. NO. 92-96, *supra* at 28, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1781-82. This passage, read in context, also provides evidence that Congress adopted Section 312(a)(7) because of concern that the lower rates mandated by the amendments to 315(b) could effectively discourage media access. As Judge Bazelon found: "The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to 'emphasize' the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during preelection periods." 629 F.2d at 12 n.32, Pet. App. 17a n.32 (citation omitted).

> of the committees [*sic*] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." [37]

A further indication that Congress did not intend to create rigid candidate access rights is found in the proposals that were considered (but ultimately rejected) to mandate specific broadcast time periods for political campaigning. Thus, Section 312(a)(7) was adopted only after Congress had also considered but rejected proposals that would have set aside specific broadcast time (or "access") periods for political campaigning. At the time, there were some groups and certain members of Congress who believed that the dual problem of escalating campaign costs spread over an increasingly lengthy period of time could or should be rectified by creating discrete political broadcast time periods.

For instance, S.1, one of the principal bills considered by the Senate prior to enactment of 312(a)(7), would have required, *inter alia*, each broadcast station and each network to make free prime time available to Presidential and Vice Presidential candidates. The bill specified the amounts of time, limited the program periods to half-hour segments, and specified the days prior to an election that the program time could be used. Moreover, reflecting the concern about the length of media campaigns, the bill would have required broadcasters to begin providing time approximately eight weeks before the Presidential general election.[38]

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[37] S. REP. NO. 92-96, *supra* at 34, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS at 1787.

[38] S.1, 92d Cong., 1st Sess. § 202 (1971). In addition, as this Court has acknowledged, Congress also considered and rejected other proposals that would have altered the policy against individualized access. Thus, it earlier rejected a bill introduced by Senator Fulbright that would have amended Section 315 to provide "a

Accordingly, viewed in the overall context in which Section 312(a)(7) originally arose, it is clear that Congress was responding to a number of concerns in a number of different ways. Although more direct solutions were considered—e.g., total or partial repeal of Section 315, and mandatory political access broadcast time periods—ultimately a more cautious, traditional approach was taken. There is certainly nothing to suggest that Congress intended to eviscerate the discretion traditionally exercised by broadcasters in response to requests for broadcast time by federal candidates. In fact, such a drastic result would have required a fundamental change in other important policies embedded in the Communications Act.

B. The Interpretation Is Inconsistent With Other Provisions And Policies Of The Communications Act

As shown, Section 312(a)(7) was enacted as part of a broad legislative reassessment of political campaigning, including the use of the broadcast media. The addition of Section 312(a)(7) to the penalty section of the Communications Act did not, however, disturb or change in any respect other provisions or policies of the Act that are premised on a concept of public trusteeship rather than a system of individualized non-discretionary access. As this Court has emphasized on several occasions, one of the most important features of the Communications Act is its rejection of a common carrier approach for

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reasonable amount of public service time" to authorized representatives of the Senate and the House of Representatives to present the views of the Senate and the House on public issues. S.J. Res. 209, 91st Cong., 2d Sess. (1970). See *CBS* v. *DNC*, 412 U.S. at 114 n.13. *See also* S.2876, 91st Cong., 1st Sess. (1969) (proposing to require television stations to provide local House and Senate candidates with specified amounts of spot announcement time as well as thirty minutes of prime time at reduced rates).

broadcasting,[39] favoring instead a system permitting broad journalistic freedom and discretion for broadcast licensees, subject to ultimate public accountability.

Thus, in *CBS* v. *DNC*, after undertaking a detailed review of the unique regulatory system created by the Communications Act, the Court concluded that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." 412 U.S. at 110. In further characterizing the legislative history, Mr. Chief Justice Burger found "nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards." *Id.* at 120.

Similarly, in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708 (1979), a case that struck down the Commission's mandatory access rule for cable television, the Court emphasized that it was "unable to ignore Congress' stern disapproval—evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike."

Finally, any survey of important statutory policies would be incomplete without stressing that Section 326 of the Communications Act, 47 U.S.C. § 326—which expressly prohibits Commission censorship of broadcast material—also "evince[s] a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109. On the

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[39] For instance, in *CBS* v. *DNC* the Court observed that, "after prolonged consideration," Congress "adopted § 3(h), which specifically provides that 'a person engaged in radio broadcasting shall not . . . be deemed a common carrier.' " 412 U.S. at 108 (footnote omitted). See Section 3(h) of the Act, 47 U.S.C. § 153(h). *See also FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) (footnote omitted) where this Court earlier stated that "broadcasters are not common carriers and are not to be dealt with as such."

whole, therefore, the legislative history of the Communications Act suggests that the decision of Congress to repudiate the concept of government ownership or control of broadcasting was "influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role." 412 U.S. at 116 (Burger, C.J.). As Mr. Chief Justice Burger further summarized:

> "The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. *Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.*" *Id.* (emphasis added) (footnote omitted).

Significantly, neither the Commission nor the Court of Appeals found any meaningful support in either legislative history or past decisions that would warrant a departure from these statutory principles. On the contrary, Section 312(a)(7) was integrated into a statutory scheme and developed against a deeply ingrained regulatory policy that mutually afford substantial discretion to broadcast licensees in the area of political broadcasting.[40]

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[40] It is particularly significant in this regard that even under the "equal opportunities" provision of Section 315(a) of the Communications Act—which grants opposing legally qualified candidates a right to equivalent response time—the Commission has recognized licensee discretion in a variety of important circumstances. *See, e.g., Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972); *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976).

1. *Prior To Its Decision In This Case, The Commission's Interpretation Of Section 312(a)(7) Reflected The Foregoing Statutory Policies*

In recognition of the foregoing statutory policies, the Commission's first significant policy pronouncement following passage of Section 312(a)(7) stressed its intention to resolve political access claims under that new provision by its traditional "test of reasonableness." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972). One year later, in its first *ad hoc* interpretation of Section 312(a)(7), the Commission elaborated upon the standard it intended to follow:

> "[W]here a licensee's judgments or policies under the circumstances represent a reasonable, good-faith attempt to accommodate both the right of Federal candidates to fully inform the voters of their candidacies and the interest of the public in programming other than political broadcasts, this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)." [41]

In subsequent decisions, although cautioning licensees against certain extreme policies—e.g., denying federal candidates program time in prime audience periods without regard to circumstances [42]—the Commission specifically refused to recognize a candidate's right to a particular length of program time or to particular placement on a licensee's broadcast schedule.[43] In fact, in a ruling

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[41] *Summa Corp.*, 43 F.C.C.2d 602, 604 (1973).

[42] 1978 *Report and Order*, 68 F.C.C.2d at 1090.

[43] *See, e.g., Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974). There, licensee denials of a senatorial candidate's request to program a four-and-a-half hour telethon on specified dates in support of his candidacy were held not unreasonable despite the candidate's claims that he needed "to explain [his] position on the issues" and

directly contrary to the Commission's ruling in this case, and one that the Court of Appeals dismisses as mere *dictum*, 629 F.2d at 16 n.59, Pet. App. at 26a n.59, the Commission's Broadcast Bureau concluded that "[a] licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." *Anthony R. Martin-Trigona*, 66 F.C.C.2d 968, 969, *application for review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978).[44]

The Commission's most extensive treatment of its policies and practices in interpreting Section 312(a)(7) came in a 1978 public inquiry. Up to that point, the Commission's interpretation of the provision had been almost entirely *ad hoc*.[45] The 1978 proceeding was de-

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"to ask financial and other support of the people in the election." *Id.* at 838. *See also Paul A. Talmey*, 49 F.C.C.2d 678 (B'cast Bur. 1974); *Hon. Donald W. Riegle*, 59 F.C.C.2d 1314 (1976) (offer of half-hour in prime or "early fringe" time instead of requested five minutes held not unreasonable even though candidate had made known his belief that a series of five minute programs was the "best way" to "introduce" himself to the voting public).

[44] In denying the reconsideration request of the senatorial candidate in that case, the Commission itself observed that "a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes." 67 F.C.C.2d at 746.

[45] The one exception was a public notice containing a set of guidelines issued in question and answer form shortly after the Federal Election Campaign Act of 1971 was signed into law. Although Section 312(a)(7) was covered, the bulk of that public notice dealt with such matters as (1) the definition of a "legally qualified candidate;" (2) rates to be charged for use of a station by candidates; and (3) the certifications stations were then required to obtain from federal candidates (concerning the new spending limits)—all matters that either had been changed by or added to the law by the 1971 Act. See *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972).

signed to examine various dimensions of the Commission's administration of Section 312(a)(7)—including the possibility of instituting more exacting standards. At the conclusion of the proceeding, however, the Commission decided against adopting either new rules or explicit policy guidelines. Instead, it favored maintaining its longstanding practice of entrusting ongoing political programming decisions to licensee discretion. In this sense, it confirmed important overall statutory policies as well as its own historical practices in implementing those policies:

> "Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes 'reasonable access' under all the circumstances present in a particular case." [46]

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[46] 1978 *Report and Order*, 68 F.C.C.2d at 1079. Although the Commission has attempted to relate its actions in this case to its 1978 *Report and Order* (*see, e.g.*, 74 F.C.C.2d at 642, Pet. App. 87a), an examination of that document fails to support this assertion. Rather, even though the 1978 *Report and Order* contained an entire section devoted to "the question of whether there should be a particular point during a campaign at which a licensee's obligation to afford reasonable access begins" (68 F.C.C.2d at 1091), that section makes no reference to the fact that the access obligation is triggered by the start of the campaign or that the agency will make that determination. Moreover, the Commission has now attributed a role to the campaign needs and desires of individual candidates which the 1978 *Report and Order* did not accord. To the extent the subjective needs of individual candidates were discussed at all in the 1978 *Report and Order*, they were mentioned in an extremely narrow and limited context. Thus, in discussing *the classes and lengths of program time* to be made available to federal candidates, the Commission stated that "licensees *may* consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; *the specific desires of candidates*, etc." 1978 *Report and Order*, 68 F.C.C.2d at 1090 (emphasis added). It is also noteworthy that, despite the Commission's present claims regarding the critical importance of the "needs" criterion, it was

Indeed, the most significant result of the 1978 proceeding was to reaffirm Commission reliance on licensee discretion. If the Commission believed that Section 312 (a) (7) created or required new terms and conditions for political broadcasting, it certainly took no action to implement such additional obligations.

For instance, the Commission's treatment of when political time sales must begin did not suggest that the relevant date was when the FCC found the campaign to have come into "full swing"—no matter how long before the election that might be (and it did not suggest any relevance for candidate "needs"). Rather, the Commission merely found that it would generally be unreasonable not to afford access to federal candidates during the statutory time periods adopted in the Federal Election Campaign Act of 1971—i.e., 60 days prior to a general election and 45 days prior to a primary election. 1978 *Report and Order*, 68 F.C.C.2d at 1091. As to when Section 312(a) (7) should be effective prior to a convention or caucus, the Commission decided against suggesting "any time limits" and merely repeated the statutory language that licensees would be expected to "afford access at a *reasonable time* prior to a convention or caucus." *Id.* at 1092 (emphasis added).

In sum, heretofore the Commission's predominant policy under Section 312(a) (7) has mirrored its longstanding policies in the political broadcasting area generally,[47] as well as practices strongly adhered to by both

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not even mentioned in the sections devoted to 312(a) (7) in the Commission's comprehensive political broadcasting *Primer* released several weeks after adoption of the 1978 *Report and Order*. See *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209, 2287-89 (1978).

[47] See *Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832 (1970); *Rockefeller for Governor Campaign, supra; Hon. Dan Walker*, 57 F.C.C.2d 799 (B'cast Bur. 1975).

the Commission and the Court of Appeals in the analogous fairness doctrine area[48]—namely, a standard of reasonableness that affords substantial deference to licensee discretion.

2. *The Decision Below Substantially Departs From These Basic Statutory Policies*

The decision below effectively ignores these basic statutory policies by shifting from the broadcaster to the Commission the central role in determining both when political time sales should commence in all federal election campaigns[49] and whether sufficient consideration has been accorded to individual candidate campaign needs. Commission evaluations would thus supplant good faith broadcaster determinations applied uniformly to all candidates.

In the Court of Appeals' view, the determination as to when Section 312(a)(7) obligations attach is "purely

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[48] See *Fairness Report*, 48 F.C.C.2d 1, 8 (1974); *Democratic National Committee* v. *FCC*, 460 F.2d 891 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972); *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971); *American Security Council Education Foundation* v. *FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 662, —— U.S. —— (1980).

[49] The determination of when time sales must begin is simply left to some form of initial "objective" Commission analysis of campaign "indicia." 629 F.2d at 17, Pet. App. 29a. Until this official "start of the election campaign," it is observed that "no request for time need be granted." *Id.* at 28, Pet. App. 54a. The precise mechanism for resolving these matters in future cases is by no means certain. In this case, of course, the "standard" was adopted after a complaint had been filed and the broadcasters had responded. In the future, will an uncertain broadcaster, faced with the first request for time in a given federal election campaign, rush to the Commission for a declaratory ruling on whether the campaign is in "full swing?" Will the Commission issue such declarations based on "all relevant facts and circumstances," *id.*, Pet. App. 54a, in literally hundreds of federal congressional or senatorial elections?

a legal judgment," not involving editorial discretion.[50] In other words, the Commission has the authority to make a legal judgment as to when a political campaign has been launched and, based upon that judgment, to impose access obligations under Section 312(a)(7). We suggest that there is nothing in the law, in logic, or the practical realities of the political process to support this approach.

First, a determination of when a campaign has begun is nothing more than a legal fiction. In reality, candidates decide when a campaign begins; they make it happen by their own actions.[51] Thus, the suggestion that the Commission has some special competence to make this determination is little more than an arrogation of governmental power. Further, the additional suggestion that broadcasters would not be totally disinterested, 629

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[50] 629 F.2d at 17, Pet. App. 28a. This *legal* judgment, as previously described (note 12 *supra*), consists of an independent survey by the Commission of various campaign developments—such as candidate announcements, fund raising activities, campaign organizations, media coverage, etc. In contrast, under the Commission's own political broadcasting rules and pursuant to longstanding agency practice, licensees are entrusted with the responsibility to make an initial *editorial* (rather than "legal") judgment concerning the same kind of campaign indicia in evaluating the bona fide status of candidates who request broadcast time. Thus, Section 73.1940(a) of the Commission's Rules and Regulations requires that, in making a "substantial showing" of "bona fide candidacy," the requesting candidate demonstrate and the responding broadcaster consider such campaign indicia as "campaign speeches," the distribution of "campaign literature," the maintenance of a campaign committee and the establishment of a campaign headquarters. 47 C.F.R. § 73.1940(a)(5).

[51] Indeed, there is evidence that we have entered the era of the perpetual campaign—at least as far as the Presidency is concerned. See *Sloan Group Planning Presidential Campaign Study, supra*, reporting that planning for the 1984 contest is well under way and that "money-raisers, opinion shapers and others are already busily at work."

F.2d at 17, Pet. App. 29a, might more appropriately be applied to an agency whose members are appointed for discrete terms by the President, whose Chairman serves at the pleasure of the President, and whose activities are the subject of continuing oversight by the Congress.

Second, a determination as to when political campaigns actually begin—whether determined by broadcasters or the Commission and however measured—is hardly dispositive as to when the sale of broadcast time must begin. This case is about media access. Neither the Commission nor the Court of Appeals offers a satisfactory justification for equating the start of the political campaign—no matter how far in advance of the election—with a broadcaster's obligation to entertain requests for the sale of media time. The result is unsupported by statute. It is not logical. And it is wrong as a matter of policy—greatly extending media campaigns (and the associated costs) directly contrary to clearly expressed legislative goals.

The lower court also endorsed the Commission's newly formulated requirement that broadcasters give weight to individual candidate needs in responding to requests for access. Under this scheme, broadcasters are effectively precluded from attempting to treat a campaign as a whole by assessing and responding to the needs of all candidates uniformly. Weighing individual candidate needs is, in fact, the very antithesis of treating candidates in the same election uniformly or as a group. It is also directly contrary to the political broadcasting tradition embodied in Section 315(a) requiring that *all* candidates be treated on an equivalent or uniform basis once broadcast facilities have been used for political appearances (i.e., the "equal opportunities" concept).

Moreover, the new focus on individual candidate needs has the practical effect of relegating to virtual obscurity such factors as the number of potential candidates com-

peting for airtime and the resulting degree of program disruption. The Commission has said that program disruption only becomes a significant factor toward the end of what candidates can choose to make a very long campaign.

Assurances by the Commission and lower court that this "needs" standard can be implemented without a "subjective" assessment of the political purposes of individual candidates [52] merely dodge or compound the problem.

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[52] *See, e.g.*, 74 F.C.C.2d at 667, Pet. App. 127a; 629 F.2d at 20, Pet. App. 35a. Indeed, the Commission's attempted assurances on this score tend to create rather than alleviate concerns in this area. Thus, as the Commission explained in its reconsideration decision, a broadcaster is not expected to evaluate "the 'political' importance or urgency of individual candidate needs in terms of a particular candidate's situation in the campaign, e.g., where he stands in the polls or how he has fared in specific primaries." 74 F.C.C.2d at 667, Pet. App. 127a. At the same time, however, the Commission further explained that the broadcaster must consider the candidate's assertions of need, such as the need "to discuss a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests," *id.* at 668, Pet. App. 128a, and the candidate's need to articulate his position and record in a manner which " 'could not be accomplished later.' " *Id.*, Pet. App. 129a. Rather than providing assurances that the "needs" standard can be maintained on any "objective" basis, the Commission's expanded explanation actually highlights the high degree of subjectivity inherent in such a standard. Moreover, one can only wonder how broadcasters and the Commission will respond to future candidate requests that emphasize the candidate's need to discuss specific issues such as national defense, or the candidate's need to respond to pending legislation that affects issues on which a candidate's campaign is principally built (a not unlikely expression of "need" by fringe or third party candidates typically stressing one particular issue), or the candidate's need to defend himself or herself against charges of a personal nature, or the candidate's need for more broadcast time at a particularly early stage in order to overcome lack of public identity. In short, once the Commission starts down this road, it becomes virtually impossible to construct rational distinctions or to maintain government neutrality. (See pp. 43-49 *infra*, for a discussion of the serious constitutional ramifications of this form of decisionmaking).

Virtually any explanation or factual justification by an individual candidate is bound to be subjective as to his candidacy. Either the broadcaster accepts the candidate's statement of his needs or the broadcaster must make his own subjective assessment of the candidate's needs. The first alternative makes candidate needs virtually controlling; the second places the broadcaster, and ultimately the Commission, in the inappropriate position of "second-guessing" campaign strategy.

By its very nature—whether characterized as "subjective" or "objective"—a regulatory standard that requires an assessment of how much broadcast time an individual candidate needs and why he needs it will defy consistent and rational application. Moreover, the inherently vague and subjective nature of such a standard merely heightens the potential for arbitrary results and administrative abuse when broadcaster judgments are reviewed—i.e., permitting decisions to shift with the political makeup of the Commission and the nature and standing of the candidate pressing a particular complaint.

Thus, the effect of these two aspects of the Commission's decision—i.e., requiring broadcast media access from the date when the Commission says the campaign has begun and requiring deference to an individual candidate's perceived "needs"—effectively anoints the Commission as the ultimate decisionmaker in all matters of political access. In this context, ABC's good faith decision to offer time for the 1980 Presidential campaign beginning in early January, 1980, but not four weeks earlier, is declared manifestly unreasonable—a process of second-guessing broadcaster judgment that defies rational explanation and conflicts with deeply embedded past precedent.[53]

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[53] In a rather remarkable "defense" of licensee discretion in these circumstances, the lower court remarked that "a counter-offer of 15 minutes as opposed to a half-hour" might have been acceptable

While the legislative history of Section 312(a)(7) is limited, it is nevertheless clear that in enacting the Federal Election Campaign Act of 1971 Congress sought to reduce campaign costs and to shorten media campaigns. In failing to address these purposes, the Court of Appeals' decision not only contributes to the frustration of such legislative goals, it highlights the distorted different course the Commission's actions actually sanction. In other words, not only have clear legislative goals been thwarted, Section 312(a)(7) has been interpreted in a manner that is conspicuously inconsistent with the overall legislative scheme generally and past practice and analogous rulings in the political broadcasting area specifically.

Finally, by interpreting Section 312(a)(7) in the manner indicated, the Court of Appeals greatly accentuates a host of constitutional problems, a subject matter we turn to in the next section.

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or reasonable. 629 F.2d at 20, Pet. App. 37a. Putting aside the separate difficulties and uncertainties a broadcaster would face in attempting to defend a position (under the standards of this case) that held that a candidate's expressed needs could be satisfied by a lesser amount than the candidate *continued* to request, the court's suggestion merely highlights the artificial and inherently subjective nature of the required decisional process under the Commission's new standards. It also shows the real absence of licensee discretion when the ultimate determination is left to agency or judicial resolution of what is or is not reasonable based on only slight factual differences. Would 15 minutes indeed have been reasonable here and 30 minutes not if the Committee had continued to press for 30 minutes before the Commission? Was the first week of January unreasonable, but the first week of December perfectly reasonable? Was ABC, therefore, only unreasonable by a matter of three or four weeks? Would the result have been different (as in the *Martin-Trigona* case, *supra*) if the candidate were someone other than an incumbent President or a major party candidate? The mind boggles at the fine lines the Commission and the courts will be required to draw in the future if the "standards" announced in this case are left undisturbed.

II. THE STANDARDS FOLLOWED BY THE COMMISSION AND APPROVED BY THE COURT OF APPEALS FOR ADMINISTERING SECTION 312(a)(7) VIOLATE FUNDAMENTAL FIRST AMENDMENT PRINCIPLES

The decision in this case touches highly sensitive areas involving both the partisan political process and the editorial/programming decisions of broadcast licensees. Under the standards approved by the court below, not only is the Commission to make "legal" determinations concerning the commencement date of federal campaigns, but it is also to sit in judgment on whether broadcast stations have been sufficiently responsive to each candidate's expression of need for the time sought.

Implementation of these newly announced Section 312 (a) (7) standards indisputably intrudes upon licensee discretion and broadcaster First Amendment rights (a requirement to schedule a program against a broadcaster's will is an intrusion—even if regarded as a permissible one). Unless the decision below is overturned, the lesson of this case is likely to be that a broadcaster must make time available to candidates for Federal office in units of time demanded by the candidate and within an extremely narrow range of dates specified by the candidate. Moreover, the obligation to broadcast will exist without regard to the nature and extent of coverage otherwise given to a particular campaign, and irrespective of broadcaster policies designed to allocate time among all candidates in a particular election on a uniform rather than individual basis. The gravamen is, pure and simple, an explicit requirement to initiate specific programming under the threat of severe Commission sanction. As such, the interpretation of Section 312(a) (7) by the Commission and the court below threatens to upset the "delicately balanced system of regulation" [54]

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[54] *CBS* v. *DNC*, 412 U.S. at 102.

specifically engineered by Congress and previously upheld by the courts to accommodate the First Amendment rights of broadcasters with other recognized needs of the statutory scheme. See pp. 30-32 *supra*.

In addition, the standards specifically sanctioned under the construction adopted by the lower court involve highly sensitive political considerations—a point emphasized by Judge Tamm:

> "The Commission, through its implementation of section 312(a)(7), has come perilously close to falling into the chasm of impermissible government action." 629 F.2d at 34, Pet. App. 68a.

While the other members of the panel stated that "[t]he majority shares the first amendment concerns expressed by Judge Tamm, and welcomes the admonition regarding agency conduct that is embodied in his concurring opinion," *id.* at 25 n.117, Pet. App. 47a n.117, the fact remains that a clearly political matter was decided by an agency split along party lines in favor of an incumbent President of the same party as the majority Commissioners. It is difficult to perceive a more dangerous example of, as Judge Tamm remarked, "nonneutral government decisionmaking," *id.* at 29, Pet. App. 56a, aggravating already significant First Amendment tensions.

Despite an attempt by the Court of Appeals to place this case within the mainstream of past political broadcasting rulings,[55] the newly diminished licensee role and the heightened Commission involvement required by the

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[55] For instance, at one point the lower court dismissed the constitutional contentions of the networks by, *inter alia*, suggesting that "[t]he interference with editorial discretion seems no more or less" here than under the longstanding Commission interpretation of the obligation of broadcasters to provide time to political candidates as a group under the general public interest standard. 629 F.2d at 23 n.102, Pet. App. 42a-43a n.102.

decision greatly exacerbate constitutional concerns. As we have shown, the considerable discretion afforded broadcasters under all preexisting standards (including those specifically applying Section 312(a)(7)) has been virtually eviscerated here.[56] Of equal significance, broadcaster discretion has been rather rudely preempted by a new and substantial involvement by the Commission in the partisan political process. This role is fundamentally at odds with the concept of a free press and the principle of licensee discretion embedded in the Communications Act.

The decision below seriously threatens the neutral role that broadcasters and the government should maintain in candidate decisions regarding how broadcast facilities are used for political purposes. It does so by delegating to the Commission the "editorial" judgment of when a certain kind of political program must commence; and by premising that decision on a standard—the needs and political objectives of individual candidates—that places broadcasters (to the extent any discretion is left) and the government (in exercising an oversight function) in the prohibitive role of deciding to inaugurate broadcast campaigning based on an examination of the activities and purposes of individual candidates.[57]

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[56] See pp. 33-41, *supra*. The Court of Appeals sought to minimize the intrusive element of its decision by contending that a determination as to when statutory rights attach is "purely a legal judgment." 629 F.2d at 17, Pet. App. 28a. According to the court, since only the "editorial process" is protected, broadcaster rights are not invaded by this type of Commission determination because it is not an editorial decision involving a choice of program material. *Id.* at 16, Pet. App. 28a. This analysis, however, conveniently ignores the fact that a Commission declaration on the state of the campaign likewise controls the start of the media campaign. And the start of the media campaign clearly affects the choice of program material—involving, as it must, the interruption of regular programming and the addition of political advertising matter.

[57] In response to these concerns, the Court of Appeals contended that the Commission would only become impermissibly involved in

Similarly, by focusing on the needs of *individual* candidates, as opposed to the needs of candidates *in general* in an overall campaign, the lower court decision distorts the process and places both the Commission and broadcast licensees in the dangerous position of effectively favoring one candidate over another.[58] The prospect of a politically-appointed government agency reviewing broadcaster judgments relating to candidate needs raises issues that go to the heart of the First Amendment.[59] As Judge Tamm emphasized in his concurring opinion, the inherent political sensitivity of requests for access under Section 312(a)(7) "raises the serious danger of non-neutral government action favoring one speaker or view-

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the election process if it "sought to *set a starting date* for the campaign, rather than merely *find* that it has *already begun*." 629 F.2d at 16, Pet. App. 27a (emphasis in original). It is clear, however, that the decision below found that Section 312(a)(7) obligations attach when the Commission rules that the campaign has begun. By making the Commission declaration on the status of the campaign the trigger date for media access, the decision effectively establishes a starting date for the media campaign—a not insignificant part of the overall campaign in contemporary electioneering.

[58] In this context, it bears mentioning that while the Commission here employed a "needs" criterion to sustain the complaint of a political candidate, in future cases it could use the same subjective and nebulous standard to deny a candidate's complaint.

[59] *See FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-46 (1978), where Mr. Justice Stevens emphasized that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." In *Buckley* v. *Valeo*, 424 U.S. 1, 57 (1976) (footnote omitted), this Court emphasized that the government may not "retain control over the quantity and range of debate on public issues in a political campaign." *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent").

point over another." [60] The highly charged circumstances of this case, involving a complaint by an incumbent President seeking reelection, highlight this danger of favoritism.[61] As Judge Tamm further observed, "members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests." [62] Moreover, "there is some evidence that the Commission has, on occasion, been subjected to direct political pressure." [63]

The principle of neutral decisionmaking emphasized by Judge Tamm and articulated by decisions of this

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[60] 629 F.2d at 34, Pet. App. 67a.

[61] In failing to act upon Judge Tamm's concerns, the court below also ignored its own teachings in *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971). There, the same court observed that an FCC decision favoring an incumbent President and disregarding an earlier agency precedent "raise[d] serious questions concerning the requirement of governmental neutrality in the area of the First Amendment." *Id.* at 1034.

[62] 629 F.2d at 32, Pet. App. 63a (footnote omitted).

[63] *Id.* at 33 n.16, Pet. App. 64a n.16. While ABC advances no suggestion that such pressure was exerted in this case, a framework nevertheless exists that would seem to call for extreme caution and agency insulation, rather than loose standards that actually depend on agency value judgments of essentially subjective factors. As Judge Tamm further observed:

> "As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners. Even if a Commissioner makes every effort to remain impeccably neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking." *Id.* at 32-33, Pet. App. 64a (footnote omitted).

Court[64] is seriously threatened by the new standards laid down in this case—standards that stress the individual needs of candidates and make the determination as to when federal election campaigns begin for purposes of broadcast time sales a "legal" judgment of the Commission. As Judge Tamm notes, unlike the regulatory approaches exemplified by the fairness doctrine and the personal attack/political editorial rules upheld by this Court in *Red Lion*,[65] the form of Commission review sanctioned under Section 312(a)(7) permits agency review and implementing orders even though the broadcaster has made no initial choice in the presentation of particular program material. In contrast, here:

> "The danger of government nonneutrality under section 312(a)(7) is exacerbated by the Commission's emphasis, in its standards governing the right of access, on the 'individual needs' of the candidate. Whether and to what extent a candidate is entitled to broadcast access depends on a weighing of his 'individual needs' against the other relevant considerations detailed by the Commission. This evaluation may lead to a determination, for example, that a candidate requesting a half hour for a particular purpose may instead be entitled to only fifteen minutes, *see* [629 F.2d at 20, Pet. App. 37a]; another candidate, on the other hand, may be found entitled to the full half hour that he seeks.
>
> "Thus, without regard to any prior broadcast coverage of opposing candidates, an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candi-

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[64] See cases cited in note 59 *supra*. See also *CBS* v. *DNC*, 412 U.S. at 117 (Burger, C.J.).

[65] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

date is entitled to be heard on the nation's airwaves." [66]

In sum, by effectively usurping any meaningful licensee discretion and failing to recognize the dangers of interjecting the Commission too deeply into the editorial process when political candidates seeking federal office request broadcast time, the decision in this case violates important constitutional principles. A scheme that so completely transfers decisions as to "whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves" also conflicts with the underlying concerns expressed by this Court in *CBS* v. *DNC* that the Commission should avoid being drawn "into a continuing case-by-case determination of who should be heard and when." 412 U.S. at 127. As this case demonstrates anew, one of the most critical problems in accommodating the First Amendment to broadcast regulation is the constant "risk of an enlargement of Government control over the content of broadcast discussion of public issues." *Id.* at 126 (citation omitted).

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[66] 629 F.2d at 32, Pet. App. 62a-63a. Judge Tamm's own solution to avoiding these profound difficulties was to approach the analysis of the "individual needs" factor by "focus[ing] solely on the candidate's needs *as stated by the candidate*"—"both at the broadcaster level and before the Commission on review." *Id.* at 34, Pet. App. 67a-68a (emphasis in original). However, if broadcasters are not required to evaluate or weigh each candidate's needs, the standard would appear to be meaningless since any candidate requesting broadcast time obviously regards such a request as necessary to his "needs." At the same time, if broadcasters and the Commission in reviewing such requests are, in fact, required to perform a political weighing process, maintaining a neutral role in the political process becomes virtually impossible.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
American Broadcasting
Companies, Inc.
1330 Avenue of the Americas
New York, NY 10019

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON &
KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

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Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
STUART ALTSCHULER
VINCENT E. GENTILE
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner National Broadcasting Company, Inc.

Of Counsel:

CORYDON B. DUNHAM
Executive Vice President and General Counsel
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020

HOWARD MONDERER
Vice President, Law, Washington
NATIONAL BROADCASTING COMPANY, INC.
1800 K Street, N.W.
Washington, D.C. 20006

Questions Presented

1. Does Section 312(a)(7) of the Federal Communications Act, interpreted in keeping with its legislative history and the First Amendment to the United States Constitution, provide an individual right of initial access to broadcast facilities to candidates for federal office?

2. Did the court below err in interpreting Section 312 (a)(7) of the Federal Communications Act so as to allow the FCC to intrude into the editorial process and to deny broadcasters discretion in crucial respects, by, *inter alia,* authorizing the Commission to determine when a federal election campaign begins and to assess "the needs of an individual candidate" for federal office?

3. Did the court below err in determining that a broadcaster had acted unreasonably in violation of Section 312 (a)(7) of the Federal Communications Act by declining to sell a half hour of broadcast time to a presidential candidate eleven months before the election and eight months before the nominating convention?

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Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

Reference to Administrative Rulings and Opinions Below

The Opinion of the Court of Appeals, per Bazelon, J., filed on March 14, 1980, and the separate concurring opinion of Judge Tamm are reported at 629 F.2d 1. The opinions are also reproduced in the joint appendix to the petitions for a writ of certiorari, commencing at page 1a.* The Memorandum Opinion and Order of the Federal Communications

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* The appendix required by Supreme Court Rule 21(k) to be submitted with the petitions for a writ of certiorari was submitted jointly by the petitioners American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS") and the National Broadcasting Company, Inc. ("NBC"), and is abbreviated herein as "Pet. JA." A joint appendix containing further material required by the Rules of this Court has also been submitted and is abbreviated herein as "JA."

Commission ("FCC" or "Commission"), adopted November 20, 1979 and released November 21, 1979, is reported at 74 F.C.C.2d 631 and is reproduced beginning at page 69a of the joint appendix to the petitions; the Memorandum Opinion and Order of the FCC on rehearing, adopted and released on November 28, 1979, is reported at 74 F.C.C.2d 657 and is reproduced beginning at page 110a of the joint appendix to the petitions.*

Jurisdictional Statement

The judgment of the Court of Appeals affirming the orders of the FCC was entered on March 14, 1980. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by the National Broadcasting Company, Inc. ("NBC") on April 18, 1980, the time to file such motion having been extended by the Court of Appeals. The motion for rehearing was denied on May 15, 1980 (Pet. JA 153a). NBC filed a petition for certiorari on August 13, 1980, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976). The petition was granted on November 3, 1980.**

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth at pages 155a-157a of the joint appendix to the petitions.

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* The parties participating in the proceedings below were: ABC, CBS, and NBC (as petitioners to the Court of Appeals); the FCC and the United States of America (as respondents in the Court of Appeals); and the National Association of Broadcasters and the Carter-Mondale Presidential Committee, Inc. (as intervenors in support of the petitioners and respondents, respectively).

** As required by Supreme Court Rule 28.1, NBC advises the Court that its parent company is the RCA Corporation ("RCA"). Neither NBC nor RCA has any corporate affiliates or subsidiaries other than wholly owned subsidiaries.

Statement of the Case

A. *The Committee's Request for Broadcast Time*

On October 11, 1979 Gerald M. Rafshoon, on behalf of the Carter-Mondale Presidential Committee (the "Committee"), wrote letters to the presidents of each of the three national television networks. In his letter to NBC President Fred Silverman (JA 37), Mr. Rafshoon stated that he was "requesting availabilities" for a half hour of network time between 8:00 p.m. and 10:30 p.m. on December 4, 5, 6 or 7, 1979.* The request to NBC recited, *inter alia*, that the Committee sought to purchase the time to broadcast a program

> "to be run in conjunction with an announcement concerning his candidacy by President Carter for [the] Democratic nomination for President, [which] consists of a documentary outlining the President's record and that of his administration. At the time this program is aired, it may be assumed that President Carter will be a legally qualified candidate under the Communications Act of 1934, as amended, and that the President would appear on the program" (JA 37).

The letter referred to the fact that the Iowa Democratic Caucus, "the first official contest to select delegates to the Democratic National Convention," was scheduled to take place on January 21, 1980, "47 days after December 7, 1979, our last requested date for availabilities" (JA 37). The letter did not refer to any other primaries or delegate selection caucuses, but noted that the news media had focused attention on the Florida Caucus and Convention and "other aspects of the 1980 campaign" (JA 38).

NBC responded by letter of October 23, 1979 declining the request to purchase time (JA 42). In its letter NBC noted that it had carefully evaluated the request, but concluded that the earliness of the requested broadcast dates (eight

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* The letters sent by Mr. Rafshoon to each network president were essentially identical.

months before the Democratic National Convention and 11 months before the national election), the multiplicity of federal candidates at that stage of the campaign (12 announced candidates had held national elective office or been Governor of a state), and NBC's obligation under Section 315(a) of the Communications Act to provide equal half-hour time periods to all candidates requesting it should NBC honor the President's request, were all factors in its decision. NBC also noted that since the nomination process was focused at that time on political activities in individual states, such as the Iowa Caucus, the Committee might wish to contact individual local stations in those states.

The other television networks also declined to grant the time requested. CBS offered to sell the Committee two five-minute periods in the first week of December. This offer was refused. ABC offered to sell time in January. This too was refused.*

B. *The Complaint*

On October 29, 1979 the Committee filed a Complaint (JA 27) against each of the networks alleging a failure to comply with the "reasonable access" requirements of Section 312(a)(7). The Committee criticized as inadequate the explanation offered by NBC.

C. *NBC's Response*

On November 5, 1979 NBC filed a Response to the Complaint (JA 60). NBC noted the guidelines established by the FCC with respect to the application of Section 312(a)

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* As a result of the Iranian hostage crisis, the Carter-Mondale Committee amended its request, seeking to purchase from any one of the networks 5 minutes of broadcast time for December 4, 1979. CBS agreed to this request and the Committee broadcast a message on that date. When the Committee sought to purchase time in January, NBC offered to sell a 30-minute time period, as did ABC; the Committee declined NBC's offer and accepted that of ABC (629 F.2d at 9; Pet. JA 11a). All of the parties below, as well as the Court of Appeals, agreed that these circumstances did not moot the controversy with respect to the original request (629 F.2d at 27-28; Pet. JA 52a-54a).

(7) and specifically stated that it "has taken into consideration the factors specified by the Commission" (JA 64). The Response listed the particular factors which had led to the decision not to provide the requested time. NBC again pointed out that the request sought broadcast time nearly a year before the general election, eight months before the Democratic National Convention, and at a stage of the process when "the campaigns waged by the presidential candidates are on a state by state basis" (JA 67). It suggested that the needs of candidates with respect to such state events could be met by local stations. The Response also pointed out that the multiplicity of candidates meant that the equal time provisions of Section 315(a) of the Communications Act would require NBC to be prepared to make half-hour periods available to a significant number of applicants in a relatively short period of time (JA 68-69). NBC emphasized the particular strain this would pose during the month of December when it had scheduled a total of only seven half-hour program positions (as compared to programs of one or two hours in length) for the period subsequent to December 7, 1979 (the last date requested by the Committee). It noted that under these circumstances the potential disruption of its schedule would be unusually great. The Response urged that under all of these circumstances NBC's decision not to make the specific time requested available was reasonable.

D. *The Commission's Orders*

The Commission entered two orders in this case, each following a 4-3 vote. Each concluded that the networks had violated Section 312(a)(7). In a number of respects, however, the two orders differed from each other significantly.

1. The Commission's Initial Order

The initial 4-3 decision of the Commission produced five separate statements by the Commissioners. The majority opinion, in relevant part, concluded:

> (a) While the statutory language does not define the scope of the Commission's responsibilities or the

procedures to enforce them and the legislative history does little to clarify these responsibilities and procedures (74 F.C.C.2d at 637; Pet. JA 78a), the "factors which [the Commission] consider[s] relevant to a Section 312(a)(7) judgment are: the candidate's needs, the number of candidates, and the availability of classes of time" (74 F.C.C.2d at 642; Pet. JA 87a). It added, however, that "particular emphasis" was placed "on the candidate's needs" because it believed "Federal candidates are the intended beneficiaries of Section 312(a)(7)" (*id.*). The Order noted that the licensee was not free to substitute its judgment for the candidate's own assessment of his "needs," but that "the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against other factors which we have said are relevant" (74 F.C.C.2d at 642; Pet. JA 38a).

(b) NBC had failed to apply the appropriate standards in that

> "NBC has apparently given no consideration to the Committee's determination that 'the most effective way to present the candidate and his record, at the beginning of the campaign, was to broadcast this half-hour program showing President Carter performing the duties of his office as President of the United States'; nor has it considered the fact that the purpose of the proposed program is to set the tone for the President's entire campaign and that this purpose cannot be accomplished at a later date" (74 F.C.C.2d at 644; Pet. JA 91a).

(c) In this context, the reasons given by NBC supporting its decision were "insufficient" (*id.*), since "the 1980 presidential campaign has begun much earlier than previous campaigns and is already in full swing" (74 F.C.C.2d at 645; Pet. JA 92a); this activity was nationwide in scope and therefore the Commission "cannot find that NBC acted reasonably in concluding

that a national campaign has not yet begun" (74 F.C.C.2d at 647; Pet. JA 94a).*

(d) Although "'multiplicity of candidates' is an appropriate factor to consider in determining whether to grant access to a particular candidate" (74 F.C.C.2d at 647; Pet. JA 95a), and although NBC was reasonable in taking into account both Republican and Democratic candidates as potential claimants of equal time under Section 315(a) if the requested time were granted (74 F.C.C.2d at 647; Pet. JA 96a), only a small percentage of the potential candidates likely would qualify as candidates and/or have the financial resources to purchase equal time, and in light of the fact that only presidential and vice presidential campaigns were national in scope, the number of candidates would not render reasonable NBC's determination not to grant the requested time (74 F.C.C.2d at 647-48; Pet. JA 96a).

(e) The potential for programming disruption was not a sufficient justification for a decision not to provide access (74 F.C.C.2d at 648; Pet. JA 97a-98a).

(f) NBC's decision amounted to an "arbitrary, 'blanket' ban" which was unreasonable (74 F.C.C.2d at 649; Pet. JA 98a).

(g) Finally, NBC and the other networks were required to inform the FCC "as to how they intend to fulfill their Section 312(a)(7) obligations on or before November 26, 1979" (74 F.C.C.2d at 651; Pet. JA 101a).**

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* NBC had, in fact, stated no such conclusion; it merely concluded that it was reasonable to decline to sell time to the Committee so many months before both the Democratic National Convention and the election itself (JA 64-67).

** The Order also held that notwithstanding the limitation of § 312(a)(7) to the revocation of "any station license or construction permit" and the absence of any reference to networks, the statute applied as well to the latter (74 F.C.C.2d at 639-40; Pet. JA 81a-83a). Although we believe that this aspect of the Order was

(Footnote continued on following page)

The difficulties presented by the Commission's decision were emphasized by three of the members of the majority. Commissioner Quello acknowledged in a separate statement that the "complaint raises some very fundamental issues which I find particularly difficult to resolve" (74 F.C.C.2d at 654; Pet. JA 107a). He emphasized the "very subjective judgments" the FCC had been called upon to make (*id.*) and explicitly stated his opposition "on First Amendment grounds" to Section 312(a)(7) (74 F.C.C.2d at 655; Pet. JA 108a).* Commissioner Quello also noted that the case "demonstrates some very practical reasons why we shouldn't be deciding matters of tactical significance to candidates" (*id.*). Chairman Ferris and Commissioner Fogarty pointed out that the decision as to what "moment in time" the requirement of Section 312(a)(7) attached "is especially difficult" (74 F.C.C.2d at 651; Pet. JA 102a). They also warned that the FCC must guard against "permit[ting] its determination to be the decisive factor turning an incipient campaign into a full-fledged one." They stated their belief that they had "avoided that danger in this case" (74 F.C.C.2d at 652; Pet. JA 103a).

Commissioners Lee, Washburn, and Jones dissented (74 F.C.C.2d at 652-54; Pet. JA 103a-107a).

On the next business day after release of the Order, NBC sought reconsideration and a stay pending judicial review (JA 174, 181).

2. The Commission's Supplemental Order

On November 28, 1979, by the same 4-3 vote, the FCC denied the motion for reconsideration and declined to stay its Order. Its Memorandum Opinion and Order of that date (the "Supplemental Order") sought to clarify the

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erroneous, we limit ourselves in this brief to the substantive errors of the Commission and the court below relating to the meaning of § 312(a)(7), regardless of the entities to which it may apply.

* At the November 20 open hearing at which the Order was adopted, Commissioner Quello stated with respect to § 312(a)(7): "I question its constitutionality. I think it offends the First Amendment" (JA 140).

Commission's position on a number of issues raised in the request for reconsideration (74 F.C.C.2d at 657; Pet. JA 110a). The principal elements of the Supplemental Order are described below:

(a) The Supplemental Order altered somewhat the Commission's description of the "candidate's needs" factor in the evaluation process, disclaiming any intention to require "broadcasters to make an assessment of individual candidate 'needs' insofar as they solely relate to the candidate's subjective, personal, or immediate 'political' desires" (74 F.C.C.2d at 667; Pet. JA 127a). The broadcaster nevertheless was to include this consideration as a factor in the weighing process and to explain how its offer of time is "responsive to the specific purpose of the . . . particular request" (74 F.C.C.2d at 668; Pet. JA 128a). The Supplemental Order did not further explain how the "needs" factor is to be used in any evaluation process.

(b) In the Supplemental Order, the Commission, for the first time, indicated that it would not defer to a licensee's reasonable judgment as to whether, among other things, it was appropriate to begin providing "use" time to candidates in a particular campaign, but instead would itself make an independent determination of when a particular federal campaign began as a purely objective matter (74 F.C.C.2d at 665-66, 673 n.19; Pet. JA 124a, 136a n.21; see also the separate statement of Commissioner Brown, 74 F.C.C.2d at 678; Pet. JA 144a-145a).

(c) The Supplemental Order also stated that "generalized assertions about the number of potential multiple requests for time" would not be considered in evaluating a broadcaster's response to a request for time. Rather, the Supplemental Order required an assessment of "actual likelihood at each stage of a campaign" and stated:

"In this connection, we think it entirely appropriate that the broadcaster contact the candidates at

> the outset and at various stages during the campaign to determine the probability of access requests by such candidates" (74 F.C.C.2d at 667; Pet. JA 126a).

The Supplemental Order did not cite any previous authority for such interpretation or requirement.*

(d) It also indicated for the first time that special weight was to be accorded to the fact that a particular request was the candidate's first request in a particular campaign (74 F.C.C.2d at 667; Pet. JA 126a-127a). Indeed, Commissioner Brown, a necessary vote in creating the majority, stated that absent "compelling" reasons, a licensee would *always* be unreasonable if it did not honor a first request (74 F.C.C.2d at 679; Pet. JA 146a).

(e) The Supplemental Order rejected the contention that Section 312(a)(7) only codified existing Commission policy at the time of its enactment, stating that this Court's language to that effect in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 113-14 n.12 (1973), was not controlling since the question had not been before the Court and "the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it" (74 F.C.C.2d at 662; Pet. JA 118a-119a).**

(f) The Supplemental Order also reaffirmed the Commission's explicit refusal to consider the constitutionality of Section 312(a)(7) on the ground that "such issues are for the courts and Congress to resolve" (74 F.C.C.2d at 665; Pet. JA 123a).

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* In this connection, it should be noted that Commissioner Brown, a member of the 4-3 majority, was explicit in refusing to take account of even the 12 major presidential candidates in assessing the issue of reasonable access (JA 251-53).

** The Commission had, in fact, urged this Court to reach precisely the conclusion that it did. *See* p. 39 n.* *infra.*

(g) The Supplemental Order acknowledged that NBC did weigh a variety of factors "against the needs of the candidate" but found these factors "unpersuasive" (74 F.C.C.2d at 671; Pet. JA 133a). It held that "NBC merely asserts in conclusory terms [that] it has weighed all relevant factors; but it has totally failed to articulate how it reached its result" (*id.*; footnote omitted).

(h) The Supplemental Order restated the networks' obligation to inform the Commission of how they intended to comply with Section 312(a)(7) by the close of business, November 29, 1979, noting that the Commission would examine those responses to see if the networks' "conduct reflect[s] a further failure to meet obligations" and that it would then decide "what, if any, specific measures may be required to remedy any continued failure to comply with Section 312(a)(7)" (74 F.C.C.2d at 676-77; Pet. JA 142a).

Commissioners Lee, Washburn, and Jones again dissented. Commissioner Lee noted that the decision simply did not leave "broadcast discretion with the networks" as the majority asserted. "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted). Commissioner Lee also stated that the reasons offered by the networks "thoughtfully included consideration of the needs of candidates, the public, and the networks" (*id.* at n.1).

Commissioner Washburn stated that the majority decision improperly emphasized the "candidate's needs" standard and "substitute[d] the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto." The dissent characterized this "governmental intrusion" as "illegal" and predicted that it would "have far-reaching consequences

that will come back to haunt the Commission and the public again and again" (74 F.C.C.2d at 682; Pet. JA 151a).

E. *The Decision of the Court of Appeals*

NBC filed a petition for review in the Court of Appeals on November 29, 1979; it also sought a stay of the Commission's decision. A panel of that court granted the stay and ordered an expedited hearing.

On March 14, 1980 a second panel of the Court of Appeals entered judgment affirming the orders of the Commission. In an opinion written by Senior Judge Bazelon, the court concluded that notwithstanding the Commission's view that the statute's language did not expressly define the scope of the FCC's responsibilities and that the legislative history provided little or no guidance, the "plain meaning" of Section 312(a)(7), as well as its legislative history, conferred an individual right of access upon candidates seeking federal office, unconditioned upon any prior use by another candidate or upon campaign coverage by the broadcaster (629 F.2d at 11-13; Pet. JA 15a-20a). In so doing, the court declined to attach any weight to Congress' expressed goal of reducing the duration and expense of political campaigns, and dismissed as mere "dictum" the conclusion of this Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 113-14 n.12 (1973), that Section 312(a)(7), rather than imposing additional access obligations upon broadcasters, "essentially codified" the Commission's prior application of the general public interest standard under Section 315(a) (629 F.2d at 13; Pet. JA 21a).

Judge Bazelon's opinion proceeded to analyze and uphold as reasonable the Commission's implementation of Section 312(a)(7). It expressly affirmed the authority of the FCC to determine when a federal election campaign begins (629 F.2d at 16-17; Pet. JA 27a-29a) and endorsed the Commission's specification of the factors to be considered in evaluating access requests under Section 312(a)(7), including: "(a) the individual needs of the candidate (as

expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request" (629 F.2d at 19; Pet. JA 33a). The court concluded that the networks had failed to apply these criteria and had thus violated Section 312(a)(7) by resorting to an "across-the-board ban" on candidate access (629 F.2d at 19; Pet. JA 34a).* The court held that, rather than applying such uniform policies, the networks must accede to the Commission's mandate that, "in addressing a request for access from a candidate for federal office, the broadcaster ha[s] to tailor his response to the *individual* candidate" (629 F.2d at 22; Pet. JA 39a-40a; footnote omitted, emphasis in original).

While the Commission had declined to consider the constitutionality of Section 312(a)(7), the Court of Appeals found the provision to be constitutional as implemented by the FCC. Rejecting the arguments raised by the broadcasters, it found that the Commission's role in determining when a campaign has begun does not constitute an impermissible governmental involvement in the electoral process (629 F.2d at 16-17; Pet. JA 28a) and that the Commission's orders do not impinge on editorial discretion or inject government into the decisional processes of broadcasting (629 F.2d at 25; Pet. JA 46a-47a). Although recognizing that the actions of the FCC "in these cases were not flawless" and that "the agency failed to headline its policy as clearly as it might have" (629 F.2d at 23; Pet. JA 42a), the Court of Appeals held that the Commission had satisfied the

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* While holding that the approach taken by the networks was unreasonable, the court noted: "The [FCC's] decisions allow the broadcaster leeway to demonstrate . . . that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that the other candidates will request time. Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible" (629 F.2d at 20; Pet. JA 37a; footnote omitted, emphasis in original).

criteria for "reasoned decision-making" required of administrative decisions (*id.*).

Judge Tamm filed a separate concurrence. He expressed throughout his opinion a pointed concern that the Commission's decision raised the specter of improper, "non-neutral" intrusion by the government into the electoral process. His concurrence reflected as well his sense of unease flowing from the very real dangers to First Amendment rights associated with a system of mandatory access provided, not under equal time or other mechanical guidelines in response to the broadcaster's own programming choices, but rather as an individual "affirmative" right to initial access. These intrusions, Judge Tamm noted, were magnified by the fact that the broadcaster's decisions regarding the granting of initial access to individual candidates, including an incumbent President running for re-election, were to be scrutinized by a Commission whose members were themselves appointed by that President (629 F.2d at 32-33; Pet. JA 63a-64a). He ultimately concluded, however, that sufficient "safeguards" existed for "controlling the danger of non-neutrality" (629 F.2d at 34; Pet. JA 67a), and that in imposing what he viewed as a "flat ban" on the sale of time the networks had abused the broad discretion granted them (629 F.2d at 34; Pet. JA 68a).

Summary of Argument

In this brief we deal first with the impact of Section 312(a)(7) as it has been interpreted by the Commission. We demonstrate the nature of the threat to the neutrality of government *vis-a-vis* the electoral process occasioned by that interpretation, a threat which flows directly from the Commission's arrogation to itself of the power to determine, for example, when a campaign has begun or to require broadcasters to weigh and then itself to reweigh the "needs" of particular candidates as against other factors considered relevant in assessing requests for access.

The Commission's implementation of Section 312(a)(7) is shown to threaten as well the delicately balanced system

of broadcast regulation. That system is one in which the values inherent in the exercise of journalistic judgment by broadcasters have been recognized by Congress and the courts, and in which the common-carrier-like status imposed by the decisions below has been explicitly rejected. The decisions below ignore these critical elements of the overall system. They do so without the slightest effort to reconcile their approach with the established regulatory system or with the broadcaster's First Amendment right to exercise discretion as to its programming. And, in unprecedented fashion, they transform a statute requiring "*reasonable* access to . . . *reasonable* amounts of time" into one under which there is to be no meaningful deference to broadcaster decisions as to what access is, in fact, reasonable. Any interpretation of Section 312(a)(7) which departs so markedly from constitutionally rooted approaches to broadcast regulation, and which in so doing threatens non-neutral governmental involvement in the electoral process as well, should not be adopted in the absence of the most explicit of congressional directions.

No such direction is present here. On the contrary, as we demonstrate in Point II of this brief, the legislative history of Section 312(a)(7) and prior interpretations by the Commission and by this Court make clear that the draftsmen of the statute intended no radical departure from the Commission's prior approach which recognized, as part of the public interest standard, a requirement that a broadcaster generally devote broadcast time to political activities, including making time available for the use of political candidates generally. Section 312(a)(7) was intended to establish this principle as a matter of statutory law and to emphasize it by providing a separate and severe sanction for violation of what had been but one of 14 elements of a general public interest standard articulated by the Commission. Nothing in the history of the statute suggests an intent to create an individualized right of initial access. The determination of the Commission and the court below to the contrary is based on a fundamental failure to come to grips with the legislative history of the statute and with

the unacceptable consequences resulting from such a determination.

ARGUMENT

At the core of this case is the question of the meaning of a statute which, as the Commission itself acknowledged, "does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them" (74 F.C.C.2d at 637; Pet. JA 78a). In this case, turning as it does on the meaning of Section 312(a)(7) of the Communications Act, it is well to begin with the words of the statute itself. That section provides:

> "(a) The Commission may revoke any station license or construction permit—
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> • • •
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> "(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

From the statutory language itself one could divine none of the striking elements of the decisions below: not that the Commission was thereby authorized to depart from its preexisting approach to candidate access and to substitute in its place a common-carrier-like obligation inconsistent with half a century of broadcast regulation; not that the Commission would as part of that new approach determine when each federal campaign begins; not that the broadcasters—and the Commission as reviewing body—are to weigh the "individual needs" of candidates for federal office against other criteria; surely not that it would be deemed *per se* unreasonable to offer to sell two five-minute periods instead of one fifteen-minute period in a December eleven months before a national election (as the Court of Appeals suggested) or to offer a half hour in January instead of in December.

We offer the Court two routes to determine the proper scope of Section 312(a)(7). The first involves an examination of the consequences of the interpretation placed upon the statutory language by the Commission: intrusion by the Commission into the electoral process; risks of politically motivated decision-making by the Commission; a likelihood of infringement upon the First Amendment; and a reversal, in any event, of all prior approaches to broadcast regulation. All of these unintended results, we urge, flow directly from the interpretation placed upon Section 312(a)(7) by the Commission—an interpretation leading to consequences of such constitutional dubiety as virtually to compel the conclusion that Congress should not be said to have sought them. Second, we turn to the legislative history itself, which (a) lends significant support to our reading, and that previously set forth by this Court, as to the proper meaning of Section 312(a)(7), and (b) lends no support whatever to the interpretation placed upon the statute by the decision below.

I.

The Improper Governmental Intrusion into the Electoral Process and the Destruction of Broadcaster Discretion Inherent in the Commission's Approach Render Its Interpretation of Section 312(a)(7) Impermissible.

A. *The Commission Improperly Assumed a Major Role in Setting the Timing for the Presidential Election*

Under the Court of Appeals' decision, the Commission hereafter is to determine "objectively" when each political campaign for each federal nomination or election in the nation has begun. The origin of the Commission's expertise in this area or the source of the congressional delegation of such power is nowhere identified either by the Court of Appeals or by the Commission;* indeed, the Commission's role in this respect was not even articulated until its Supple-

* Congress is given the power to regulate congressional elections under Article I, Sections 4 and 5 of the Constitution; its powers with respect to setting the time of presidential elections are set forth in Article II, Section 1, Clause 3.

mental Order.* In an area as sensitive as governmental regulation affecting the electoral process, one may legitimately expect an express grant of regulatory power from Congress; in its absence, so broad and sweeping a construction of the FCC's authority is clearly suspect.

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* The Commission's Initial Order seemingly applied a general "reasonableness" standard in evaluating the broadcaster's judgment that the timing of the requested broadcast relative to the overall nomination and election process was one among several factors that made a particular request for time inappropriate (74 F.C.C. 2d at 643-44, 646-47; Pet. JA 89a-90a, 94a). This was in keeping with Commission precedent, which had recognized that there was no single date upon which a campaign "began" so as to bring into play § 312(a)(7). Rather, each licensee was free to make a reasonable judgment as to when it would begin offering "use" time to candidates with respect to various campaigns. Thus, the Commission's Broadcast Bureau had earlier stated, in a decision unchallenged by the Commission until the Supplemental Order, that an assessment of when a campaign was sufficiently underway as to warrant the provision of access was confided to broadcaster discretion. In *Anthony R. Martin-Trigona,* 66 F.C.C.2d 968 (Broadcast Bureau 1977), *reconsideration denied,* 67 F.C.C.2d 743 (1978), the Bureau concluded:

> "A licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence." 66 F.C.C.2d at 969.

Similarly, in dismissing the appeal of the senatorial candidate in that case, the Commission itself stated in the most general terms possible that "a candidate is not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes. . . ." 67 F.C.C.2d at 746.

Adherence to this approach would have avoided some of the most obtrusive aspects of the Commission's new role. It would have resulted in a variety of differing, but reasonable, judgments by individual broadcasters as to when "use" time should be provided —a far healthier result for the political and broadcast systems than a centralized determination by the FCC as to when each federal election campaign begins.

Furthermore, for the Commission to have found NBC's conduct to be unreasonable for failing to adhere to standards first announced in its Supplemental Order says much about the nature of the Commission's approach in deciding this case. The Court of Appeals dismissed the rulings in *Martin-Trigona* as "dictum" (629 F.2d at 16 n.59; Pet. JA 26a n.59), and nowhere dealt with the fact that the Commission's Initial Order characterized the question of timing as one of reasonable licensee discretion.

The Court of Appeals viewed the FCC as an objective observer whose determinations are removed from and have no effect upon the electoral process; that is surely a view as unworldly as it is unlikely to have been held by Congress. The court itself recognized the significant role played by television in electoral campaigns, stating that "it would be hard to overestimate the importance of television to our political processes" (629 F.2d at 10; Pet. JA 12a). A finding by the Commission that statutory obligations to provide initial access have attached would, in a very real sense, represent the firing of the starter's gun. Once any candidate is authorized by the government to begin his television campaign, opponents hang back at their peril. A decision by the Commission in this regard surely has a momentum and an impact of its own.

In support of its conclusion, the Court of Appeals stated that "[a] determination of when statutory obligations attach is not an editorial decision" but instead "is purely a legal judgment," which the Commission was legally permitted to make on its own, without the slightest deference to the views of broadcasters (629 F.2d at 17; Pet. JA 28a). This view (flatly contrary to that previously taken by the Commission) begs the essential question of whether Congress intended the FCC to become involved in such politically charged decision-making—decision-making which involved in this case presidential appointees determining, on the basis of a 4-3 vote along strict party lines, whether time must be sold to the President himself.

Nor does anything in Section 312(a)(7) suggest an intent to confide such power to the FCC.* When Congress

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* The approach adopted below expressly declined to make any use whatsoever of time frames established elsewhere in the very legislation of which § 312(a)(7) is a part. The Commission was explicit in this respect, declining to read § 312(a)(7) "in conjunction with Section 315(b)(1)" (74 F.C.C.2d at 638; Pet. JA 79a-80a). The latter section, passed at the same time, established periods of 60 days before a general election and 45 days before a primary election during which a licensee would be prohibited from

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has intended federal agencies to play an active regulatory role in the electoral process, it has been conscious of the delicacy of that role and sought to insulate the agency from the political process;* no such effort was made in connection with Section 312(a)(7). The decision of the Commission majority, affirmed by the court below, that the FCC is to determine "objectively" when the campaign begins places the Commission in a position it was never intended to occupy.

The electoral process, of course, is fundamental to our representative democracy. Government regulation designed to ensure the integrity of that process has been sustained (*see Burroughs* v. *United States*, 290 U.S. 534 (1934); *Jenness* v. *Fortson*, 403 U.S. 431 (1971)), but only when the effect of that regulation does not infringe upon the "neutral" and "open" process of selecting those who make and enforce the laws. *See Bullock* v. *Carter*, 405 U.S. 134 (1972); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Indeed, the concern that government intrusion into the political process may impermissibly favor particular candidacies or induce public suspicion about the impartiality of a government regulatory scheme animated much of this Court's discussion in *Buckley* v.

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selling broadcast time to candidates at more than its lowest unit rates. The Commission concluded that in separating the two provisions Congress intended the 45- and 60-day periods not to define the time limits for "reasonable access" under § 312(a)(7). This is debatable in itself; it is all the more striking in light of the Commission's choice instead to decide for itself when election campaigns have begun. When Congress did intend that government become involved in the electoral process it chose clear and objective standards; the Commission opted instead to plunge into the electoral thicket itself.

* The otherwise limited nature of the Commission's involvement in electoral regulation generally may help to explain its adoption of an approach to § 312(a)(7) which directly frustrates two principal goals of the Federal Election Campaign Act of 1971 (of which § 312(a)(7) was a part)—namely, the shortening of campaigns and the reduction of their cost. These purposes are considered in Part II, *infra*, in an analysis of the legislative history of the Act.

Valeo, 424 U.S. 1 (1976). *See also* L. Tribe, *American Constitutional Law* 774 (1978).

The dangerously incestuous relationship between a government agency and the electoral process authorized by the decision below should not be sanctioned—most certainly not in the absence of the most explicit congressional direction.

B. *The Principal Criterion Relied Upon by the Commission—the Individual Candidate's "Needs"—Is Either Unconstitutional or Meaningless*

Under the ruling below, the Commission is, as well, to sit in judgment on whether the broadcasters have been sufficiently responsive to each candidate's statement of his needs for the time sought. It was in response to these holdings that Judge Tamm observed:

> "[U]nlike the regulatory approaches upheld in *Red Lion*, section 312(a)(7) deals solely with candidates for federal political office; in evaluating the danger of government nonneutrality, we cannot ignore the fact that members of the Federal Communications Commission may well have more than a passing interest in the outcome of federal elections, particularly presidential contests. . . . As the present case suggests, the campaign for the Presidency itself is likely to be the most important occasion for the application of section 312(a)(7). The President and his party obviously have a strong interest in the outcome of a presidential election, particularly if the President himself is a candidate for reelection, and, by the time the campaign begins, the incumbent President will have appointed several (if a first-term President) or perhaps all (if a second-term President) of the sitting Commissioners" (629 F.2d at 32-33; Pet. JA 63a-64a).*

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* *See* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 184 (1978):

> "In the past twenty-five years . . . every President, except President Ford, has had the opportunity to place his stamp on

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Judge Tamm's own conclusion was that these difficulties, threatening as they obviously are, could be surmounted if, "both at the broadcaster level and before the Commission on review, analysis of the 'individual needs' factor . . . focus[es] solely on the candidate's needs *as stated by the candidate* . . . ." (629 F.2d at 34; Pet. JA 67a-68a; emphasis in original). Yet, if the networks and, more importantly, the Commission are not to assess or weigh each candidate's needs, the "needs" criterion would seem to be meaningless: any candidate who requests time obviously believes he "needs" it. How then are these "needs" to be a factor in any evaluative process if some entity other than the candidate is not to assess the legitimacy of those needs? And if the networks—and, more significantly, the Commission itself—*are* required to engage in some kind of political weighing process (*see* 74 F.C.C.2d at 642; Pet. JA 87a-88a), what becomes of the neutrality properly viewed as essential by Judge Tamm? The Commission established, as a crucial criterion in determining whether or not "reasonable access" has been afforded, a concept which either

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the agency within his initial term of office. In addition to selecting the Chairman, these Presidents—often aided by vacancies created by members leaving before the expiration of a full term—have been able within a single term to appoint at least three members of the Commission. In their five-year terms, Presidents Johnson and Nixon appointed six and seven FCC members, respectively" (footnote omitted).

Judge Tamm also noted:

"[T]he Commission has, on occasion, been subjected to direct political pressure. In a 1970 memorandum describing administration efforts to achieve more favorable press coverage by the three major television networks, Charles Colson, Special Counsel to then President Richard M. Nixon, indicated that, 'as soon as we have a majority' he would pursue with Dean Burch, the newly-appointed Commission Chairman, a Commission ruling that would have 'an inhibiting impact on the networks.' . . . In a taped conversation in 1972, President Nixon himself threatened to use the Commission to retaliate against *The Washington Post* for unfavorable coverage: 'The main, main thing is the Post is going to have damnable, damnable problems out of this one. They have a television station . . . and they're going to have to get it renewed' " (629 F.2d at 33 n.16; Pet. JA 64a-65a n.16).

has no meaning or dangerously involves the FCC in the political process.

What weight, for example, is a broadcaster to assign to a candidate's declaration that he needs 30 minutes to discuss foreign affairs, or tax issues, or charges of political corruption? Can a broadcaster—or the Commission—distinguish among these situations with the constitutionally required neutrality? The Commission expects broadcasters to justify the adequacy of their response to a request for access in terms of meeting the candidate's needs. CBS, for example, was faulted for making "no effort to explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request. CBS provided no explanation as to how two such short segments could afford enough time for a discussion of subjects as broad as those the candidate intends to discuss" (74 F.C.C.2d at 668; Pet. JA 128a-129a). How is such an explanation to be proffered without assessing the validity of the candidate's claimed need for the time? And if the requirement of neutrality bars such analysis, what is the broadcaster to assess? Neither the Commission nor the Court of Appeals answered these questions.

In this case President Carter stated his desire to commence his campaign with a half-hour broadcast; presumably he best knew his needs. A lesser known candidate might as reasonably have requested—and "needed"— two hours. Congressman Crane began his presidential campaign more than two years before the 1980 election; Vice President-elect Bush began his campaign 18 months before the election. Presumably, these early starts reflected realistic, or in any event incontestable, assessments of their needs. How is a broadcaster to "evaluate" such a candidate's view of his own "needs"? What of the even greater needs for exposure of minor-party candidates?

The Commission and the court also rejected any effort by the broadcaster to establish uniform, neutral approaches applicable to all candidates for federal office, insisting instead on an "individualized" approach tailored to each

candidate, with the Commission sitting in review.* Unlike the equal time provisions, no objective, mechanical criteria exist under the Commission's approach as approved by the court below;** instead each broadcaster is to evaluate each

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* This refusal to accept any uniform, neutral approach has been reinforced in subsequent decisions of the Commission. *See, e.g., Kennedy for President Committee,* 80 F.C.C.2d 93, 98-100 (Broadcast Bureau 1980); *Ed Noble for U.S. Senate Committee,* 79 F.C.C.2d 903, 908 & n. 7 (Broadcast Bureau 1980). In *Ed Clark for President Committee,* 48 R.R.2d 433 (FCC Broadcast Bureau 1980), while rejecting a complaint that NBC failed to offer a candidate a sufficient number of 5-minute programs in prime time, the Commission's Broadcast Bureau stressed once again:

> "The Commission Policy Statement On Section 312(a)(7), the Carter-Mondale decisions, and later Commission interpretations of those decisions [citing *Kennedy* and *Ed Noble, supra*] have emphasized the importance of consideration by the broadcaster of a candidate's individual needs. This special consideration can be attributed to the Commission's belief that 'Federal candidates are the intended beneficiaries of Section 312(a)(7).'" 48 R.R.2d at 437 (footnote omitted).

The Bureau again rejected any attempt by broadcasters to formulate and apply a uniform, even-handed approach:

> "Under the Carter-Mondale principles, we do not think it is permissible for a network to set aside a specific number of program times of a particular length and divide those times among the potential requestors. Such a practice would appear to contradict the requirement for a broadcaster to consider each candidate's individual needs on a request-by-request basis." *Id.* at 438.

Only a few weeks later, however, in holding that ABC had violated § 312(a)(7) by requiring 17 days' advance notice for the clearance of advertisements on its radio network, the Bureau stated: "One remedy [for the technical problems of last-minute clearance] would have been for the network to set aside a certain number of spots for sale to political candidates and obtain clearance in advance from the affiliates." *Barry Commoner,* 48 R.R.2d 545, 550 (FCC Broadcast Bureau, 1980). The Bureau failed to explain how this approach would allow the network to accommodate a candidate's "individual needs," or how it could be reconciled with the Bureau's previous statements in *Ed Clark,* quoted above.

** The Commission itself has recognized in other decisions the dangers of departing from such objective standards and has expressed its reluctance to involve itself in questions that require the Commission to make difficult policy judgments in the electoral field. Thus, in *Paulsen* v. *FCC,* 491 F.2d 887, 890 (9th Cir. 1974), in rejecting the claim of a presidential candidate that his television

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request in light of each candidate's needs, the number of prior requests, and the multiplicity of candidates who will seek equal time; this judgment is then to be subject to Commission review.*

It is difficult to imagine a less attractive or more dangerous area for the Commission to enter than this. Inevitably, as Chairman Ferris conceded during the initial hearing in this matter, access decisions—by government—would involve a "value judgment" about a candidate and his campaign (JA 157) and would require consideration of campaign strategies (JA 137-38). This is precisely the intrusive role that government may not play in the political process. *See Buckley* v. *Valeo, supra.* The Commission's rejection of any general rules applicable to all candidates in favor of individualized treatment of a candidate's specific request maximizes the intrusiveness of the Commission's action.**

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appearances as a professional entertainer should not give rise to equal time obligations under § 315, the court acknowledged the wisdom of the Commission's position that

> "it must apply [a] strict rule regarding the application of § 315 in order to avoid the unauthorized enlargement of involvement in broadcast operations. Paulsen's proposed distinction between political and non-political use would, the FCC contends, require it to make highly subjective judgments concerning the content, context, and potential political impact of a candidate's appearance. We agree."

The Commission has reaffirmed this position even after its decisions in this case. *See Carter-Mondale Reelection Committee, Inc.*, 48 R.R.2d 414, 421-22 (FCC 1980); *Kennedy for President Committee*, 76 F.C.C.2d 964, 968 (1980), *aff'd sub nom. Kennedy for President Committee* v. *FCC*, No. 80-1482 (D.C. Cir. Aug. 6, 1980).

* The Court of Appeals has subsequently noted the sharp contrast between the inquiry made by the FCC under the exemption of "bona fide newscasts" from the equal time obligations of § 315, where the Commission focuses "only on the nature of the event and the reasonableness of the broadcaster's treating it as a bona fide newscast," and the inquiry it has permitted the FCC to make under § 312(a)(7), where the focus is "the individual circumstances of the requesting candidate." *Kennedy for President Committee* v. *FCC*, No. 80-1482, Slip op. at 17 n.61 (D.C. Cir. Aug. 6, 1980).

** Under the Commission's approach, for example, any effort to make available uniform program lengths or time periods to all

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As this Court recognized in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94 (1973), in refusing to find that a system of access for editorial advertisements was constitutionally required:

> "Under a . . . Government supervised right-of-access system . . . , the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.
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> ". . . The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when." *Id.* at 126-27.

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candidates for a particular office would necessarily be held unacceptable for failure to defer to each candidate's individual "needs," which must be weighed by the broadcaster—and ultimately by the Commission—against any other relevant factors with respect to each particular request. The administrative nightmare created by the hundreds of such decisions to be made during each election season by individual broadcasters and, in many cases, reviewed by the Commission on a highly expedited basis, only adds to the unacceptability of this governmental intrusion into the electoral process.

Moreover, the Commission has failed to apply uniform standards of its own in such decision-making. The inconsistencies over time in the Commission's interpretations of § 312(a)(7) can easily be traced in its decisions. *Compare Hon. Donald W. Riegle,* 59 F.C.C.2d 1314 (1976) (upholding licensee's rejection of candidate's 5-minute program and offer of 30-minute program and spot announcements instead, despite candidate's asserted "need" for program-length time and financial inability to purchase a 30-minute slot), *with Ed Noble for U.S. Senate Committee,* 79 F.C.C.2d 903 (Broadcast Bureau 1980) (holding licensee in violation of § 312(a)(7) for rejection of candidate's 5-minute program and offer of 30-minute program and spot announcements instead), *and WGN Continental Broadcasting Co.,* 58 F.C.C.2d 1142 (1976) (holding licensee in violation of § 312(a)(7) for refusal to sell spot announcements while offering 5-minute or longer programs instead). For a lengthy review of the Commission's fitful and inconsistent applications of § 312(a)(7), see Albert, *The FCC Assumes a New Role as Regulator of Broadcast Advertising and Candidates' Access,* 54 St. John's L. Rev. 279 (1980).

In times past, the FCC itself has well understood the risks involved in making such judgments and has declined to follow that path. For example, in *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974), in upholding under Section 312(a)(7) a broadcaster's decision not to sell to a candidate a five-hour block of late-night time, the Commission stated:

> "[W]ere we to call upon licensees to justify their programming selections or program scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when—a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid." *Id.* at 849.

These concerns were ignored by the Commission and the Court of Appeals here.

Other criteria applied by the Commission aggravate rather than alleviate the risks of intrusion. Thus, in rejecting the broadcasters' reliance on the existence of a multiplicity of candidates and the potential equal time obligations that would arise from the granting of one candidate's request under Section 312(a)(7), the Commission required a showing that specific requests for equal time were likely to be made. It expressed its expectation that broadcasters would "contact the candidates at the outset and at various stages during the campaign to determine the probability of access requests by such candidates" (74 F.C.C. 2d at 667; Pet. JA 126a). Apart from its administrative impracticality, this approach forces broadcasters into what is, at best, the uneasy position of investigating the tactical and financial positions of candidates at government behest. Presumably, it also assumes that candidates will respond to such inquiries with a degree of openness and clarity that they might not generally provide to a journalistic organization, lest they forfeit a later demand for access. If anything, only the most compellingly clear legislative expression could justify such consequences.

C. *The Commission's Interpretation of Section 312(a)(7) Undoes the Delicately Balanced System of Broadcast Regulation*

The decision below not only improperly places the Commission at the heart of the electoral process; it does so in a fashion which maximizes the disruption of the broadcast system and the "delicately balanced" system of regulation to which this Court has referred. *See CBS* v. *DNC, supra,* 412 U.S. at 102. Such a result, raising constitutional issues of the largest and most threatening dimensions, can hardly be attributed to the Congress that adopted Section 312(a)(7).

As interpreted by the Commission and the Court of Appeals, Section 312(a)(7) would impose the single most far-reaching and intrusive restrictions on broadcaster editorial judgment ever sanctioned by the federal government in the name of "access." As interpreted below, the statute requires a broadcaster to make time available to candidates for federal office in units of time demanded by the candidate and within a narrow range of dates specified by the candidate. The obligation attaches regardless of the nature or the extent of coverage otherwise given by the broadcaster to the election campaign at issue. And the specific program which *must* be broadcast is selected by the candidate alone, one which the broadcaster may not edit or exercise editorial supervision over in any way.*

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* *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Commission has been vigilant in cautioning broadcasters that they have no authority to exercise any editorial judgment over political "uses" under the "non-censorship" provision of § 315(a). For example, when Barry Commoner, a candidate for the Presidency, submitted to the NBC Radio Network a 60-second radio spot which used a barnyard epithet at the outset to engage the attention of listeners, and the NBC Network advised its independently owned affiliated stations that although the commercial could not be censored by NBC it contained language that "some may find offensive," a complaint was filed against NBC by Commoner. Although NBC prevailed (on the ground that it did accept and distribute the advertisement,

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Significantly, the Commission's requirement that access be given to specific candidates in accordance with their self-defined needs is *not* one which, like the personal attack doctrine dealt with in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), or the equal time requirements of Section 315(a), is triggered by other programming which the broadcaster has chosen to present; nor is it, like the Commission's general public interest standard, an obligation which may be met in a variety of fashions within the reasonable judgment of the broadcaster.* *See Humphrey*

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after review by counsel, on the same day it was submitted), the Commission's Broadcast Bureau sternly admonished NBC that the initial negative reaction of its staff to broadcasting the announcement had been "clearly in error," that the language of its advisory to affiliates had been "unfortunate" and that, if "censorship by the affiliates [in fact occurred], NBC may have been derelict in its obligations under Section 315 to Commoner." *Barry Commoner*, Slip op. at 5-6 (FCC Broadcast Bureau, Oct. 30, 1980).

* The refusal by the Commission and the Court of Appeals to afford any deference to the reasonable judgment of broadcasters is one of the most striking and consistent features of the rulings below. One illustration of the Commission's approach is Commissioner Quello's statement: "I think maybe [the networks] had good reason for opposing [the request] but . . . I disagree with the conclusions of the networks . . ." (JA 140). Another is the previously discussed abandonment by the Commission (in contrast to its own prior holdings) of any deference to a licensee's decision as to when it would begin to offer "use" time to candidates in a particular election. Similarly, in weighing the factor regarding the "multiplicity of candidates," the Commission relied totally on its own unsupported assessment of the likelihood that other candidates would seek equal time in response to the Committee's proposed broadcast.

It remains difficult to fathom why the decisions of NBC (and ABC) to offer a half hour in January rather than December, or the decision of CBS to offer two 5-minute periods rather than a half hour in December, were so clearly improper as to be held unreasonable in a system purportedly based on deference to broadcaster discretion. Indeed, the Court of Appeals itself recognized that an offer of 15 minutes in December might well have been "defensible" (629 F.2d at 20; Pet. JA 37a). Despite the lip-service paid to the concept of broadcaster discretion, it is quite clear, as the dissenting Commissioners suggest, that the Commission's abandonment of certain criteria applied by it in the past, and its redefinition of

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for President Campaign, 34 F.C.C.2d 471 (1972). As Judge Tamm recognized in his concurrence, the Commission's policy "is designed not to achieve a balanced presentation of ideas, but rather to grant air time to particular speakers for initial presentations of their views" (629 F.2d at 32; Pet. JA 62a).

No such access requirement has yet been recognized by this Court. Indeed, in both *CBS* v. *DNC* and the Court's more recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), the Court expressed the gravest concerns as to the constitutionality of such requirements. In *CBS* v. *DNC*, the Court rejected the argument that a compulsory right of access for editorial advertisements was constitutionally compelled. While it did so without determining whether such a system would violate the First Amendment, this Court manifested its concern that the Commission would intrude too far into broadcaster discretion in attempting to enforce even a limited system of access. It thus observed:

> "By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast discussion of public issues. . . .
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> "Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular indivi-

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others, eviscerated any real broadcaster discretion. As Commissioner Lee stated in dissent:

> "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted).

dual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of." 412 U.S. at 126-27 (footnote omitted).

Again, in *Midwest Video,* the Court manifested its concern with mandatory access requirements, invalidating the Commission's access rules for cable television systems. In the absence of the clearest congressional authority for the Commission's departure from the legislative policy against imposing common-carrier obligations upon broadcasters reflected in Section 3(h) of the Communications Act (47 U.S.C. § 153(h)), the Court held that the FCC may not impose mandatory initial access requirements. The Court stated:

"[W]e are unable to ignore Congress' stern disapproval —evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

". . . In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded [the] limits [of its authority] in promulgating its access rules. . . . We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress." 440 U.S. at 708-09 (footnotes omitted).

In both *CBS* v. *DNC* and *Midwest Video,* the Court noted the distinct risks of governmental as opposed to journal-

istic decision-making as to what should be broadcast.* Indeed, so sensitive is the balance thus far struck between the private journalistic discretion of broadcasters and their public obligations that even minimal additions to the obligations imposed by the fairness doctrine—a doctrine involving far less direct interference with broadcaster decisions as to the content and timing of broadcasts than the requirements at issue here—have been recognized as sufficient to threaten the whole. *See CBS* v. *DNC, supra. See also Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288, 296-97 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 934 (1976). In *Accuracy in Media,* the Court of Appeals itself declined to interpret the Public Broadcasting Act in a fashion which would "threaten to upset the constitutional balance struck in *CBS*" in the absence of a clear legislative intent compelling such a reading of the Act. Here, the Commission's interpretation would have precisely that effect, compelling broadcasters to air particular programs at governmental direction and then to incur specific additional programming obligations under the equal time requirements of Section 315. Such an interpretation would tilt the carefully achieved—and constitutionally required—balance of broadcast regulation by stripping the broadcaster of editorial control over significant amounts of broadcast time. Such a result is, at the very least, of the most dubious constitutionality. It surely may not be "presumed" to have been Congress' intent in the absence of far clearer evidence,

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* The price of deference to broadcaster discretion is, of course, the relegation to private judgment of decisions that do have a significant impact on matters of grave importance. The alternative, however, is government decision-making as to who shall be heard and when. Neither approach is without problems but, as this Court observed:

> "Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." *CBS* v. *DNC,* 412 U.S. at 105.

This case illustrates well the wisdom of that conclusion.

let alone where, as here, the legislative history demonstrates that Congress intended no such result (*see* Point II *infra*).

* * *

We do not, of course, suggest that providing the public with full information about presidential and other federal elections is anything but a vital goal; but there is no contention here, nor could there be, that at the time of his request Mr. Carter had not received enormous amounts of coverage on the NBC Network—both as President and as a soon-to-be-announced candidate for reelection—or that he would not receive even more such coverage in the future. By the same token, there is no contention that NBC has not honored equal time obligations when they have come into play. Nor is there any contention that NBC has not, in past elections (including that just past), sold substantial blocks of time to presidential candidates well in advance of the conventions and primaries. The Commission and the Court of Appeals have nonetheless interpreted Section 312(a)(7) in such a way as to thrust the Commission into the electoral process itself, threaten protected constitutional rights, and deviate from long established principles of broadcast regulation. All these consequences could and should have been avoided by a far different interpretation of the statute than that proffered by the Commission and sanctioned by the Court of Appeals. Such an interpretation would avoid the grave constitutional problems occasioned by the Commission's statutory reading.* And, as we next show, it would faithfully reflect the intention of Congress itself, as the decision below does not.

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* Fundamental to this Court's exercise of its power of review is the principle that it will endeavor to construe a challenged statute narrowly in order fairly to avoid a serious constitutional issue. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973); *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-72 (1947).

II.

The Decision Below Is Contrary to the Legislative History of Section 312(a)(7) and the Intent of Congress.

A. *The Law Prior to the Enactment of Section 312(a)(7) Provided No Individual Right of Initial Access to Specific Candidates*

From the earliest days of federal regulation of broadcast communications, the question of providing access to the airways for those who wished to speak about public issues generally and for political candidates specifically has generated much discussion. In 1973, this Court canvassed the history of that debate in its decision in *CBS* v. *DNC, supra,* 412 U.S. at 103-14. What emerged from that history was a consistent rejection by Congress of every effort to create any right to initial access in any particular group or individual for political or other purposes.

Thus, as this Court noted, Congress expressly rejected a 1926 proposal that would have rendered a broadcast station a "common carrier" with respect to use "by a candidate or candidates for any public office, or for the discussion of any question affecting the public." 67 Cong. Rec. 12503 (1926). In enacting the forerunner of Section 3(h) of the Communications Act, Congress firmly rejected the idea of broadcasters as common carriers. *See also Midwest Video, supra,* 440 U.S. at 708. As this Court emphasized in *CBS* v. *DNC,* "Congress intended to permit private broadcasting to develop with the widest possible journalistic freedom consistent with its public obligations." 412 U.S. at 110.

Over the years, the Commission and Congress have sought to advance the public interest by a variety of statutory and regulatory provisions in the area of elections and political issues. Thus, Section 315(a) of the Communications Act has long required that when a broadcaster provides time to one candidate for a particular political office, "equal time"

must be offered to all of that candidate's opponents. Similarly, an individual who is personally attacked on a broadcast is entitled to reply time. These opportunities are, of course, responsive in nature, directed to serving the interests of balance and fairness.

In addition to these specific doctrines, the FCC through the years developed a more generalized concept of the public interest. The Court recognized as early as 1959 that "the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings and in comparative contests for a radio or television construction permit." *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959) (footnote omitted). In 1960, the Commission again noted the significance of such broadcasts, identifying fourteen "major elements usually necessary to meet the public interest, needs and desires of the community," one of which was "political broadcasts." *Report and Statement of Policy Re: Commission En Banc Programing Inquiry*, 44 F.C.C. 2303, 2314 (1960).

Failure to provide such kinds of programming could be an important consideration in license application or renewal controversies, although superior performance in some of the fourteen areas might be viewed by the Commission as balancing out deficiencies in other areas, including political coverage. *See, e.g., Loyola University*, 12 R.R. 1017, 1099 (FCC 1956).

Neither the courts nor the Commission have ever understood the FCC's policy with respect to this public interest requirement as granting a right of initial access to any particular candidate. Instead:

> "While a licensee has an obligation to carry other legally qualified candidates for office if he presents one candidate for the office, he has no such obligation with respect to that first candidate; on the contrary, he can use his judgment as to whether there is an interest in affording time to this particular campaign as against

other political contests, and as to any other programing considerations that may be pertinent. . . .

• • •

". . . In short, the licensee's role in the area of political broadcasts is essentially the same as in the other programing areas—to make good faith judgments as to how to meet his community's needs and interests." *Memorandum of Federal Communications Commission Concerning Interpretation of Second Sentence of Section 315(a), Communications Act of 1934, as Amended, reprinted in Political Broadcasts—Equal Time, Hearings on H.J. Res. 247 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 1st Sess. 85, 90 (1963).*

See also Humphrey for President Campaign, 34 F.C.C.2d 471, 472 (1972); *Rosenbush Advertising Agency, Inc.,* 31 F.C.C.2d 783 (1971); *W. Roy Smith,* 18 F.C.C.2d 747 (1969); *J. B. Lahan,* 40 F.C.C. 342 (1962).

This was the law at the time Section 312(a)(7) was enacted. That existing body of law established no right of

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* The Commission continues to apply the same standard to coverage of state and local elections:

"[C]andidates in state and local elections have no initial right of access to broadcast stations and individual stations have the responsibility and discretion to determine which state and/or local elections are of sufficient interest and importance to cover, and to choose the method by which to cover them . . . . A licensee's discretion in providing coverage to elections extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign/election coverage will commence. A licensee's failure to establish its policy towards the type of coverage which will be afforded to an election which is still five months in the future, or a decision not to accept political advertising until two and one half months before the election, cannot be said to be an unreasonable refusal to devote adequate coverage to a significant and important election." *Hon. Dan Walker,* 57 F.C.C. 2d 799, 800-01 (Broadcast Bureau 1975).

For a recent reaffirmation of this principle, see *State Senator William H. Hernstadt,* 79 F.C.C.2d 944, 947-48 (Broadcast Bureau 1980).

initial access in any specific candidate, but left to the reasonable discretion of the broadcaster how it would cover elections—subject to the clear understanding that it was expected to devote broadcast time to political campaigns under the public interest standard and, of course, to comply with the fairness doctrine, the equal time rules, and other regulations of the Commission. The question thus arises: Was the enactment of Section 312(a)(7) intended to create the individual right to initial access in particular candidates which prior Commission policy had not? We think the answer is clearly no.

B. *This Court Has Previously Interpreted Section 312(a)(7) in a Fashion Directly Contrary to the Interpretation Adopted Below*

This Court has already answered precisely that question in just that way. In *CBS* v. *DNC*, in the course of deciding that neither the Constitution nor the Communications Act required the grant of access to potential political advertisers, this Court, as noted above, reviewed the history of broadcast regulation by Congress and the Commission to determine whether rights of initial access were granted under any provision. It noted that the basic principle underlying the fairness doctrine—crucial to the overall system of broadcast regulation—was "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949). The Court then noted that "[c]onsistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities." 412 U.S. at 113 (footnote omitted). Finally, it made clear that this rejection of any initial access right extended to Congress as well as to the Commission:

> "Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several

> occasions[12] and considered various proposals that would have vested private individuals with a right of access.[13]" *Id.* at 113-14.

Footnote 12 to that strongly worded statement first acknowledged congressional approval of the fairness doctrine in statutory form. It then considered Section 312(a)(7) and stated:

> "Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license 'for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.' Campaign Communications Reform Act of 1972, Pub.L. 92-225, 86 Stat. 4. This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U.S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315(a), in Political Broadcasts—Equal Time, Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90." 412 U.S. at 113-14 n.12.

Thus, this Court, in support of its conclusion that despite various amendments of the Communications Act Congress had never chosen to alter a policy that denied any individual the "right to command the use of broadcast facilities," specifically considered Section 312(a)(7) and concluded that its enactment was consistent with that view since it essentially codified existing FCC policy, which imposed no such requirement.*

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*If anything, that point is emphasized by way of contrast to the proposed legislation described in the Court's footnote 13. That legislation would have vested initial access rights in Senators and Congressmen, much as the Commission now interprets § 312 (a)(7) to grant such individual rights to candidates for federal

(Footnote continued on following page)

The Court of Appeals dismissed this Court's interpretation of Section 312(a)(7) as "cursory" and characterized it as "*dictum* [which] strayed far from what was before the Court" (629 F.2d at 13; Pet. JA 21a).* We think it clear

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office. This Court, in support of its conclusion that no such right had ever been granted, noted that such proposals had been rejected.

* In addition to characterizing this Court's statement as dictum the Commission sought to avoid its impact by stating: "That question was not before the Court; and the Court did not consequently have the benefit of an interpretation by the agency with the obligation of enforcing it" (74 F.C.C.2d at 662; Pet. JA 119a). In fact, however, the Commission (and the United States) had put forth in their brief in *CBS* v. *DNC* an interpretation of § 312(a)(7) which explicitly stated that the statute codified already existing obligations:

> "In exercising its discretion, the broadcaster would fail to carry out its obligations to the public if it did not make time available to candidates for political office on a reasonable basis, since the purpose of Section 315 'is to facilitate political debate over radio and television.' *Farmers Union* v. *WDAY*, 360 U.S. 525, 534; see F.C.C. Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time*, Hearings before Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90; see also *En Banc Program Policy Statement*, 25 Fed. Reg. 7291. Congress has now codified this duty to the limited extent of permitting the Commission to revoke licenses 'for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.' Section 103(a)(2)(A), P.L. 92-225, approved February 7, 1972. Congress also revised the language of Section 315, *supra*, by adding the following italicized words: 'no obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate.' Section 103(b)(2)(B). Except to the extent modified, Congress has adhered to the original policy adopted in 1927." Brief of United States of America and FCC at 42-43 n.37, *CBS* v. *DNC*, *supra*.

In supporting this proposition, the Commission relied in its brief upon two of the authorities later referred to by this Court in its footnote 12: the decision in *Farmers Union* and the Commission's Memorandum on the Second Sentence of Section 315(a). Thus, contrary to the statement of the Commission in this case, this Court had before it the Commission's considered view of § 312(a)(7) and the Court's opinion took full and careful account of the Commission's position—by adopting it.

from the discussion above that this Court's interpretation represented an essential element in the exposition of Congress' historical antipathy to compelled initial access; as such, we believe it represents a considered and accurate appraisal of the limited intent of Section 312(a)(7). But we need not rely upon even the explicit statement of this Court to support our view of Section 312(a)(7), for the legislative history of that section makes clear the intent to do no more than enact into statutory form the substantive requirements of existing Commission policy, while making explicit the availability of license revocation as a penalty for repeated or willful disregard of that statute whether or not the licensee had otherwise performed well under the other public interest criteria.

C. *The Legislative History of Section 312(a)(7) Explicitly Manifests the Congressional Intent to Codify Pre-Existing Requirements of Candidate Access*

The Court of Appeals recognized in a footnote to its opinion—but otherwise failed to take into account in its decision—that the only legislative history which specifically relates to Section 312(a)(7) indicates that it was intended to underscore then-current FCC practice. The court went on to conclude:

> "The report of the Senate Commerce Committee, which provides the most detailed discussion of the 1971 Act, characterizes Section 312(a)(7) as a statutory attempt to 'emphasize' the existence of an obligation to make time available to candidates in order to discourage licensees from reducing access in response to restrictions set elsewhere in the 1971 Act on the rates they could charge candidates during pre-election periods. S.Rep. No. 96, *supra,* at 34, *reprinted in* U.S. Code Cong. & Admin. News at 1781-82. However, it must be said that there is no specific explanation of the statutory language or statement of its intended impact in the Senate Report." (629 F.2d at 12 n.32; Pet. JA 17 n.32).

The court is in error in its concluding sentence. A fuller quotation of the passage referred to by the Court of Appeals makes clear the congressional understanding that no new substantive right was being created. The Senate Commerce Committee, after adding the provision which was to become Section 312(a)(7) to the bill (S. 382) that it recommended be passed (which at that time still included a provision eliminating the equal time requirements of Section 315),* in fact commented twice on the provision. The Committee stated:

> "Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee

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* The language which was to become § 312(a)(7) was added as an amendment to S. 382 by the Senate Commerce Committee. S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787. A related provision had earlier been included in S. 956, introduced by Senator Scott, but that provision was not enacted. *See* p. 42 n.* *infra*. These bills were two of three companion bills dealing with federal campaign reform which Congress was considering simultaneously in 1971. All three bills included provisions repealing in whole or in part the equal time requirements of § 315; the predecessor of § 312(a)(7) originally appeared as a subpart of a statutory section which partially repealed those requirements. S. Rep. No. 96, *supra*, at 2-3. There was a general consensus among the members of the Senate Committee and those who testified before it that § 315 had resulted in candidates receiving "no time" rather than "equal time." *See, e.g., id.* at 25, 34, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1778, 1787; S. Rep. No. 229, 92d Cong., 1st Sess. 116-17 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1854-55; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 152 (1971) (remarks of Senator Pastore).

It may well be that § 312(a)(7) was originally meant to compensate for repeal of the equal time requirements by ensuring that broadcasters would not construe such repeal as a diminution of their public interest obligations. This certainly is the thrust of the explanatory statements concerning § 312(a)(7) quoted in the text. While the Senate passed a partial repeal of the equal time requirements, the House version of the bill did not include such a provision and the Conference Committee eliminated it. S. Conf. Rep. No. 580, 92d Cong., 1st Sess. 21 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1866-67.

> to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission *has recognized* this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (1960)." S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787 (emphasis added).

And, in the passage from which the Court of Appeals quoted in part, the Committee made clear the congressional understanding that no increase in the broadcaster's obligation was intended:

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC *should continue* to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. *Certainly no diminution* in the extent of such programming should result from the enactment of this legislation.
>
> "In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S. 382 contains an express provision to this effect." S. Rep. No. 96, *supra,* at 28, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781-82 (emphasis added).*

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* That Congress did not intend any significant departure from existing FCC practice in enacting § 312(a)(7) is further confirmed

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Thus, the only evidence of legislative intent with respect to Section 312(a)(7) shows that the statute was meant to provide a new penalty* and to underscore the obligation of broadcasters to provide time to political candidates generally. There is *no* indication that Congress intended to create a new right of access, certainly not one which requires the Commission to thrust itself into decisions regarding the commencement of campaigns and which requires it to assess the broadcaster's "weighing" of each candidate's needs.**

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by the statement of a sponsor of a related provision in S. 956 (a companion bill to S. 382, the bill finally enacted):

> "[T]here is a firm declaration of congressional intent that broadcasters have certain obligations to the public and to political candidates during election campaigns. Most of this language is excerpted directly from existing Federal Communications Commission regulations and from Federal court decisions affecting the operations of broadcasters. *I am simply codifying this language,* thus making it clear, without specific congressional regulation, that Congress is dead serious in its belief that broadcasters must deliver the goods in the public interest. If past performance is any indicator, I am certain they will." *Federal Election Campaign Act of 1971: Hearings on S.382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration,* 92d Cong., 1st Sess. 117-18 (1971) (statement of Senator Scott; emphasis added).

The provision included in S. 956 also provided for implementation by FCC rule-making; this aspect of the proposal was not adopted. *See Federal Election Campaign Act of 1971: Hearings on S.1, S.382, S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 132-34 (1971).

* As noted earlier, the Commission's *Report and Statement of Policy Re: Commission En Banc Programing Inquiry,* 44 F.C.C. 2303 (1960), listed political broadcasts as only one of 14 major program elements to be considered in assessing license renewal or revocation. Obviously, § 312(a)(7) "emphasized" the importance of this type of programming, making willful or repeated failure to provide "use" time a separate and distinct basis for revocation without regard to the licensee's compliance with other aspects of the public interest standard.

** In support of its interpretation of § 312(a)(7) the Court of Appeals relied to some extent upon the fact that the statute applies

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Statutory approval of existing Commission policy, of course, is not unusual in this area. In 1959, for example, Congress codified the Commission's fairness doctrine in Section 315(a). *See Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908, 922 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969). Legislative codification of an administrative policy makes pertinent standards more accessible and also provides a vehicle for Congress to ensure the continuation of current agency practice otherwise subject to alteration with changes in the agency's membership. *Cf.* 1A Sutherland, *Statutory Construction* § 28.16 (4th ed. 1972). Here, in addition to serving these purposes, Section 312(a)(7) also provided a new—and powerful—sanction for noncompliance to go along with the already existing interpretation of the public interest standard.

The Commission and the court below largely ignored the legislative history of Section 312(a)(7) itself. Indeed, the Commission found that "[t]he legislative history of Section

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only to federal candidates. It reasoned that "[t]his is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine" (629 F.2d at 11-12; Pet. JA 16a; emphasis in original). This puts an extremely heavy burden on the statute's reference to federal candidates—one that the language simply cannot bear. Moreover, in point of fact there are other, more credible reasons for the limitation. Most obviously, the central focus of the Federal Election Campaign Act was on federal campaigns, as the title of the Act itself suggests. Furthermore, as noted above, the provision was originally introduced as a limited counterweight to repeal of the equal time provisions of § 315; the proposed repeal of that section, however, pertained only to federal candidates. *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 11-14, 53 (1971). More generally, the legislation of which § 312(a)(7) was but one part may have been considered least subject to constitutional challenge insofar as it related to federal candidates; it was thought that Congress should be wary of enacting legislation affecting the states' political campaigns. *See* S. Rep. No. 96, 92d Cong., 1st Sess. 32 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1785; S. Rep. No. 229, 92d Cong., 1st Sess. 99-103 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1839-42.

312(a)(7) does little to clarify" the Commission's "responsibilities and procedures" (74 F.C.C.2d at 637; Pet. JA 78a). The Commission and the court instead focused on one overall purpose of the Federal Election Campaign Act of 1971 of which Section 312(a)(7) was a part. That Act, both concluded, was intended to give greater rights of access to candidates for federal office.*

In fact, this analysis misreads the method by which such access was to be granted and wholly ignores two other crucial purposes of the overall legislation—both of which are significantly and unnecessarily frustrated by the refusal to give effect to Congress' expressed intent to codify existing obligations.

The "increased access" to which the Commission and court refer was to be accomplished through specifically

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* The court below also attributed significance to the fact that in enacting § 312(a)(7) Congress made a "conforming amendment" to the second sentence of § 315(a) which added the italicized phrase, "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate" (emphasis added). The Court of Appeals concluded: "If Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to Section 315 would have been required" (629 F.2d at 12; Pet. JA 18a).

The court's interpretation is simply erroneous. The second sentence of § 315(a) makes clear that no initial right of access is granted to any candidate by the "equal opportunities" provision of that section. The court below overlooked the fact that, as originally enacted, this sentence read: "No obligation is *hereby* imposed upon any licensee . . . ." Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170, *reenacted as* Communications Act of 1934, ch. 652, § 315, 48 Stat. 1064 (emphasis added). The word "hereby," however, was omitted during codification as a "redundancy." *Obligation of Licensee to Carry Political Broadcasts*, 25 R.R. 1731, 1732 n.1 (1963). When Congress amended the sentence in 1971 by reinserting the functional equivalent of "hereby," it merely indicated that the general obligation to provide reasonable access to candidates—an obligation *not* imposed by § 315 but already inherent in the public interest standard—had been codified in a separate provision of the Act. In no way did Congress thereby comment upon the content of that obligation, much less suggest that it now conferred upon candidates "individual rights" to access.

identified provisions of the bill. None of these included the provision that was to become Section 312(a)(7). *See* S. Rep. No. 96, 92d Cong., 1st Sess. 20-21 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773-74; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 152 (1971). Thus, the Senate Report cited by the court below (629 F.2d at 12 n.32; Pet. JA 17a n.32) refers to increased access and then states: "To accomplish its purpose, Title I, as amended, would do the following . . . ." * Each of the provisions relied upon to achieve the "greater access" referred to by the Report is then listed. The repeal of the equal time provisions and the requirement that lowest unit advertising rates be made available to candidates, for example, are specifically enumerated. Conspicuous by its absence, however, is any reference to what was to become Section 312(a)(7). While increased access in some form may have been the goal of the proposed repeal of the equal time provisions, it was *not* a goal of Section 312(a)(7). That section was designed, as the legislative history clearly indicates—and as this Court has stated—to codify existing Commission practice.

It is clear that one significant purpose of the Federal Election Campaign Act of 1971 was to *reduce* campaign costs.** The legislation also included a provision which, the legislators hoped, would shorten media campaigns.*** But

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* S. Rep. No. 96, *supra,* at 21, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1774.

** *See* S. Rep. No. 96, *supra,* at 20-22, 31-33, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1774-75, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 151 (1971) (remarks of Senator Pastore).

*** This provision, now § 315(b)(1) of the Communications Act, established periods of 60 days before a general election and 45 days before a primary election during which a licensee would be pro-

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neither of these goals was even addressed by the Court of Appeals in its opinion.* The decisions below have had the anomalous and impermissible effect of thwarting both of these legislative purposes at once, for the decisions ensure both lengthier and costlier campaigns.**

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hibited from selling broadcast time to candidates at more than its lowest unit rates. Senators Prouty, Cooper, and Scott noted that "[e]veryone agrees that political campaigns tend to be too long. We are hopeful that the 45- and 60-day provisions will encourage shorter campaigns." S. Rep. No. 229, 92d Cong., 1st Sess. 118 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1855. To the same effect, see *Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 393 (1971) (remarks of Chairman Magnuson and Senator Hart); *id.* at 619 (remarks of Senator Pastore); S. Rep. No. 96, *supra,* at 28, 34, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781, 1787; 117 Cong. Rec. 30075 (1971) (remarks of Senator Dole).

* The court also ignored another overall concern of Congress—minimizing the advantages of incumbents. *See Federal Election Campaign Act of 1971: Hearings on S.1, S.382 and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 1st Sess. 525 (1971) (testimony of Attorney General Kleindienst noting that the purpose of § 315 was to reduce the incumbent's media advantage); *id.* at 348 (remarks of Senator Scott); 117 Cong. Rec. 28812 (1971) (remarks of Senator Prouty). In view of the congressional concern with the media advantage accorded incumbents, it is particularly baffling that the FCC expressly elected to exclude the media coverage of incumbents from its assessment of a candidate's "needs" (74 F.C.C.2d at 669-70; Pet. JA 130a-131a).

** The latest presidential campaign was longer and more expensive than any in history. Television advertising played a major role in both respects. The burden of that campaign on the electorate as well as on the candidates has been noted by one commentator:

> "The dead weight of the 1980 presidential campaign has fallen away, and Americans, no matter how they voted, seem to be walking with that little bounce in the spirit that comes when an ordeal is over, a decision finally made. The evening hour, for example, seems unaccountably more pleasant; the reason may be that political advertising has abruptly vanished from television—a sweet, almost subliminal improvement in

(Footnote continued on following page)

The Court of Appeals' decision, as well as the orders of the Commission, ignore other clear statements of Congress as to its intent in enacting the Federal Election Campaign Act of 1971. Thus, much of the Commission's analysis seems to proceed from the premise that federal candidates were the "intended beneficiaries" of the Act (74 F.C.C.2d at 642; Pet. JA 87a).* In fact, however, the legislation was directed toward improving the electoral process for the benefit of the country at large. According to the key spokesmen for the legislation, their goal was not to benefit any individual candidate, but the public and the electoral process.** This difference is not merely semantic or rhetorical but one with real consequences. It is the difference between an individual right of access granted only to federal candidates, which the Commission and the court below fashioned, and the previously recognized and generally enforced obligation of broadcasters to sell time to political candidates generally in the public interest. The view of the Commission, for example, that individual candidates are the "intended beneficiaries" of the legislation doubtless resulted in its use of the subjective criterion of

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the moral atmosphere. No more candidates hagiographically displayed, saints mixing radiantly with the adoring throng; no more of those sarcastic prosecutorial voice-overs about the other guy, the pitchman's tone as low and urgent and insinuating as a whisper of Cassius in the ear. No more that tussling, scuffling sound of the reluctant national psyche being dragged on a leash toward a booth with curtains and a lever in it." Morrow, "Stop the Endless Campaign, Please," *Time*, Dec. 1, 1980, at 54.

* The Commission has continued to place special emphasis on this interpretation in even more recent decisions. *See, e.g., Ed Clark for President Committee*, 48 R.R.2d 433, 437 (FCC Broadcast Bureau 1980).

** *See* S. Rep. No. 96, *supra*, at 20-21, 31-33, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773-74, 1784-86; *Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 151 (1971) (statement of Senator Pastore).

an individual candidate's "needs" as a determining factor. By making an "individual right" the focal point of its view of the statute, rather than looking to the public interest or the campaign as a whole, the Commission and the Court of Appeals rejected the even-handed approach followed by the Commission in the past, one which properly focused on whether the licensee was providing adequate amounts of time generally to political candidates.

The need for *ad hoc*, and ultimately subjective, assessments concerning candidates "needs," "rights of access," and the starting date of such an amorphous process as a "national campaign" would not have been required by the interpretation of the statute which the FCC itself had previously urged upon this Court in *CBS* v. *DNC* and which this Court had itself accepted.* Indeed, the inconsistency in the positions taken by the FCC since the enactment of Section 312(a)(7) goes far to undermine the acceptability of its interpretation of the statute in this case. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974).

The decisions below, based as they are on a misreading of the legislative history of Section 312(a)(7) in particular and of the Federal Election Campaign Act as a whole, could not stand even if that misinterpretation had no significant impact on our regulatory and political systems. But as discussed in Part I above, the consequences of that misreading have the most serious impact on the freedom of broadcast journalism and the integrity of the electoral process. The interpretation given the statute below cannot stand.

---

* *See* p. 39 n.* *supra*.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
STUART ALTSCHULER
VINCENT E. GENTILE
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner National Broadcasting Company, Inc.

Of Counsel:

CORYDON B. DUNHAM
Executive Vice President
and General Counsel
NATIONAL BROADCASTING
COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020

HOWARD MONDERER
Vice President, Law, Washington
NATIONAL BROADCASTING
COMPANY, INC.
1800 K Street, N.W.
Washington, D.C. 20006

December 18, 1980

Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS

ERWIN G. KRASNOW
(Counsel of Record)
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560

Attorney for Respondent
NATIONAL ASSOCIATION
OF BROADCASTERS

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS

Preliminary Statement

Respondent National Association of Broadcasters ("NAB") hereby adopts the Statements of the Case contained in the briefs filed in this Court on this day by Petitioners American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. NAB is likewise satisfied with the presentations made by those petitioners in compliance with Rule 34.2(a), (b),

(d)-(f) and, pursuant to Rule 34.2, does not here duplicate those presentations.

ARGUMENT

NAB represents over 5000 individual radio and television stations, all of which have a vital interest in the outcome of this proceeding. On behalf of this national membership, NAB urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit here under review. In NAB's view, the lower court decision is contrary to the legislative history and purposes of Section 312(a)(7) of the Communications Act, and usurps the editorial discretion vested in broadcasters by both the First Amendment and fundamental policies of the Communications Act as interpreted by pertinent decisions of this Court.

NAB has reviewed advance copies of the briefs filed today in this case by Petitioners CBS, NBC and ABC, and hereby states its general support for the arguments advanced therein. Because those briefs contain a comprehensive treatment of the issues presented for review and because those briefs present a compelling case for reversal, NAB does not consider it necessary to supplement them at this time. In this regard, NAB notes that it set forth reasons for granting writs of certiorari in these cases in a document filed earlier with this Court.[1] NAB incorporates herein by reference the legal arguments made in that memorandum.

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[1] See Memorandum of Respondent National Association of Broadcasters in Support of Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed in Case Nos. 80-207, 80-213 and 80-214.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

ERWIN G. KRASNOW
(Counsel of Record)
NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560

Attorney for Respondent
NATIONAL ASSOCIATION
OF BROADCASTERS

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AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT R. BRUCE
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
LISA B. MARGOLIS
Attorneys

Federal Communications Commission
Washington, D.C. 20554

In the Supreme Court of the United States

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NATIONAL BROADCASTING COMPANY, INC., PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission correctly determined that Section 312(a)(7) of the Communications Act provides an affirmative right of reasonable access to broadcast stations for individual candidates seeking federal elective office.

2. Whether the Commission correctly determined that petitioners failed to provide reasonable access as required by Section 312(a)(7).

3. Whether Section 312(a)(7), as applied by the Commission, is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 629 F.2d 1. The decision of the Federal Communications Commission (Pet. App. 69a-109a) is reported at 74 F.C.C.2d 631. The Commission's opinion and order denying reconsideration (Pet. App. 110a-151a) are reported at 74 F.C.C.2d 657.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. Petitions for rehearing filed by petitioners in Nos. 80-213 and 80-214 were denied on May 15, 1980. The petition for a writ of certiorari in No. 80-207 was filed on August 11, 1980. The petitions for a writ of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The petitions were granted on November 3, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 312(a)(7) of the Communications Act, 47 U.S.C. 312(a)(7), provides:

> The Commission may revoke any station license or construction permit—
>
> * * * for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

2. Section 315(a) of the Communications Act, 47 U.S.C. 315(a), provides in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford

> equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.

3. Section 4(i) of the Communications Act, 47 U.S.C. 154(i), provides in pertinent part:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

4. Section 303(r) of the Communications Act, 47 U.S.C. 303(r), provides in pertinent part:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall— * * * [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter * * *.

STATEMENT

The Proceeding Before the Commission

1. In early October 1979, the Carter-Mondale Presidential Committee advised petitioners ABC, CBS and NBC that it desired to purchase a thirty-minute time period during "prime time" on one of four alternative days—December 4, 5, 6, or 7, 1979. The Committee explained that it needed the time to present a documentary film setting forth the record of President Carter and his administration during the preceding three years. The requested time period coincided with President Carter's scheduled announce-

ment of his candidacy for reelection. The request also asserted that the 1980 campaign already had commenced, as evidenced by forthcoming caucuses and conventions and intensive media coverage (J.A. 35-40). Petitioners ABC and NBC both refused to offer any time in response to this request (J.A. 41-43). Petitioner CBS offered to sell two five-minute program segments, only one of which fell within "prime time" (J.A. 44-45). The networks' rejection of the Committee's request was based on their assertion that it was too early in the presidential campaign to begin selling time for political broadcasts, that any sale would force them to sell time to a substantial number of rival candidates, and that such sales would result in disruption of their regularly scheduled programming (J.A. 41-45, 52-93).

In view of the refusal of ABC and NBC to sell the Committee any time, and the refusal of CBS to sell time that responded to its request, the Committee filed a complaint with the Federal Communications Commission alleging that the networks had violated the "reasonable access" requirement of Section 312 (a)(7) (J.A. 27). The Committee asserted, *inter alia*, that (*id.* at 28-29):

> The prime time programming of all three networks is almost exclusively devoted to entertainment programming for commercial purposes. Each network on week nights (and Saturdays) schedules six half-hour prime time periods and eight on Sundays for a three network total of 132 per week or 528 per month.
>
> * * * * *
>
> * * * [T]he Committee is seeking to use the [requested] half-hour program for an appearance by the President shortly after he formally declares his candidacy * * *. The proposed program would stress the President's record and that of his administration. It is intended to set

> forth the basic case for renomination and thus it was desirable to air the program shortly after the announcement. It is planned to have the television appearance coincide with more than 2,000 small-donor, grass roots fundraising gatherings in communities throughout the country. * * *
>
> The request of the Committee was made nearly two months in advance of the air date in order to ease the scheduling burden on the networks * * *. Also, the time requested was selected so as not to interfere with the national ratings sweep period which is so important to network sales.

The Committee also asserted that it had not made any other requests for time, and, because of the expense of such time, it would not likely make any such additional requests in the near future (*id.* at 33). Finally, the Committee alleged that none of the reasons advanced by the networks for their refusal to sell the requested time was sufficient to justify their actions (*id.* at 29-32).

2. After considering the networks' responses to the Committee's complaint (J.A. 52-93), the Commission found that each network had acted unreasonably in responding to the request to purchase time and that each therefore had failed to fulfill its obligations under Section 312(a)(7) of the Communications Act (Pet. App. 69a).

Initially, the Commission rejected the networks' contention that it was "too early" in the presidential campaign to begin selling time for political broadcasts. The Commission identified numerous objective facts that led to the conclusion that the presidential campaign already was "in full swing" (Pet. App. 92a-94a).[1] The Commission therefore turned to a

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[1] The Commission relied on prior decisions establishing that the point when a broadcaster must afford reasonable access

consideration of the reasonableness of the networks' responses.

The Commission found that, in contravention of its previously announced legal standards (see *Report on Enforcing Section 312(a)(7)*, 68 F.C.C.2d 1079, 1090 (1978)), the networks had applied "blanket" policies in dealing with the request for time, rather than attempting in good faith to tailor their responses to the particular request of the individual candidate (Pet. App. 90a-101a). The Commission saw no evidence that the networks, in their responses to the Committee or in their pleadings, had given any consideration at all to the candidate's individual request. By failing to offer *any* time that would coincide with the President's planned announcement of his candidacy, NBC and ABC simply cut off the President's intended presentation to the public (*ibid.*). And by offering only five minutes in prime time to allow the Committee to summarize the President's record over a three-year period, CBS ignored the Committee's assertion that this was " 'totally insufficient' in amount to present the 'detailed and thoughtful' picture of the administration's record envisioned by the Committee * * *" (*id.* at 100a).

In addition to finding that the networks failed to make any reasonable attempt to tailor their responses to the stated request of the candidate, the Commission also found that the networks' reliance on countervailing factors was lacking in support. While the Commission acknowledged that broadcasters may

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varies depending upon the nature of the particular campaign (Pet. App. 88a-91a). The Commission previously had determined that "a presidential campaign may be in full swing almost a year before an election." *Report on Enforcing Section 312(a)(7)*, 68 F.C.C.2d 1079, 1091 (1978) (*1978 Report and Order*).

take into account the likelihood of requests for reply time from other candidates in determining whether to grant access to a particular candidate, it found that the danger of multiple requests in the present case was remote. The Commission explained that, in December 1979, it was unlikely that more than a small percentage of candidates would soon become "legally qualified" under the Commission's rules, and that, in any event, few candidates would "have the financial resources necessary to purchase a half hour of network prime time" (Pet. App. 96a).[2] Accordingly, the Commission concluded that the likelihood of requests from multiple candidates did not justify the networks' denials (Pet. App. 95a-96a, 99a-101a).[3]

Finally, the Commission rejected the contention that potential "programming disruption" justified the denial of access in this case. While the Commission acknowledged that disruption was a factor properly to be considered (*id.* at 97a), it found the likelihood of disruption to be minimal. The Commission observed (*id.* at 98a): "the request for time was made far in advance of the closing days of the campaign and nearly two months prior to the broadcast date. Furthermore, as the Committee has stated, 'it gave

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[2] A request for equal time under Section 315 of the Act must be presented to the broadcaster within seven days by a rival candidate who has qualified under the Commission's rules. 47 C.F.R. 73.1940(e). A half hour of prime time on CBS costs between $172,000 and $186,000 (J.A. 171).

[3] In reference to CBS's offer of 5 prime time minutes, the Commission observed (*id.* at 100a-101a): "Even if all 13 major party candidates were entitled to equal treatment, CBS' policy would result in the sale of only 65 prime time minutes—a total of miniscule proportions when it is realized that there are approximately 5400 minutes available in prime time in a single month."

the networks considerable leeway in providing availabilities' in that it listed four alternative dates for the broadcast, and we recognize that the networks in fact make frequent scheduling changes for their own commercial purposes."

3. In a subsequent order denying reconsideration of its original decision, the Commission rejected (Pet. App. 118a-119a) the networks' argument that Congress intended Section 312(a)(7) merely to codify prior Commission policy under the general "public interest" standard.[4] The Commission pointed out that it previously had considered and rejected that argument in its *1978 Report and Order*.[5] The Commission also clarified the principles applicable in determining when a campaign is underway and what amount of

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[4] As discussed on pages 22-23, *infra*, the Commission's "public interest" policy, which applied to all political broadcasts prior to the enactment of Section 312(a)(7), merely required broadcasters to make some time available for political programming. No obligation rested on broadcasters to give reasonable consideration to individual requests by candidates for air time. This general duty to offer some political programming applied without distinction to local, state and federal campaigns.

[5] In the *1978 Report and Order, supra*, 68 F.C.C.2d at 1088, the Commission stated: "We see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the Commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. Moreover, Congress limited the applicability of the 'reasonable access' provision to candidates for Federal elective office. The Commission's [prior] policy made no specific distinction between those candidates and candidates for state and local office. Therefore, it seems clear that Congress was creating a different, additional obligation which was to apply only to Federal candidates."

consideration must be given by a broadcaster to a candidate's request for time.

The Commission explained that, in deciding when a campaign has commenced—and therefore when it is no longer reasonable for broadcasters to deny requests for access on a blanket basis—the Commission would consider all relevant evidence tendered by the networks and the candidate. The Commission stated that, since "[n]either broadcasters nor candidates bring a perspective of total objectivity * * * to questions of the initial applicability of Section 312(a)(7)," determination of this threshold issue is an appropriate subject for the Commission's own "independent evaluation * * * taking into account the position of the candidate and the networks as well as other factors" (Pet. App. 124a).

In light of the networks' apparent misunderstanding of the original order's discussion of candidate needs, the Commission further explained the importance of, and the limitations on, that consideration. The Commission stated that the purpose for its focus on the needs of individual candidates was to ensure that broadcasters would give consideration to "each request in its own specific context on a particularized basis" (Pet. App. 126a).[6] The Commission emphasized that "the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate," but rather is only one factor to be considered in the weighing process (*id.* at 128a). However, the Commission reiterated that a broadcaster must attempt "to tailor his offer of air time to be as

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[6] The Commission noted (*id.* at 135a) that "blanket determinations," of the kind found to exist here, "too easily allow decisions based on [the] broadcaster's own convenience or economic interest * * *."

reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking air time" (Pet. App. 128a). Thus, while broadcasters are not expected to evaluate or censor the subject matter of individual programs, to " 'second guess' the 'policital' wisdom * * * of longer versus shorter formats," or to assess the "candidate's subjective, personal, or immediate 'political' desires" (Pet. App. 127a), they should "consider the particular nature of the request made so that 'as much as possible' and 'within reasonable limits' airtime will be responsive to the candidate's needs" (Pet. App. 135a). In this case, the Commission explained, the networks clearly had made no effort at all to be responsive to the candidate's request (Pet. App. 137a-139a).

Finally, the Commission stressed the importance of a full explanation of the broadcaster's reasons for denying a candidate's request. The requirement of a full explanation is "essential to assuring that we do give careful consideration, and appropriate deference, to a broadcaster's discretion [because] [w]e must deal essentially with the broadcaster's own reasoning" (Pet. App. 136a). In this case, it was not possible for the Commission to defer to the networks because their explanation for their actions disclosed that they failed to consider those factors that the Commission previously had held must be considered in evaluating candidate requests. See *1978 Report and Order, supra*, 68 F.C.C. 2d at 1090; Pet. App. 135a-139a. In particular, the networks' refusals to afford air time rested on the erroneous legal conclusion that Section 312(a)(7) imposed no obligation on them to consider and attempt to accommodate the particular request of the individual candidate.

The Decision of the Court of Appeals

On petitions for review, the court of appeals unanimously affirmed the Commission's ruling (Pet. App. 1a-68a). With respect to the networks' assertion that Section 312(a)(7) merely "codified" the Commission's prior "public interest" policy, the court held (Pet. App. 14a):

> Our study of the plain language of Section 312 (a)(7) and our review of the legislative history of the provision leads us to conclude that Section 312(a)(7) *did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office.

The court explained (*id.* at 15a) that the literal text of the statute "speaks in terms of individual candidates—'*a* legally qualified candidate' seeking time to advocate '*his* candidacy.' By contrast, the Commission's policy before Section 312(a)(7) gave no attention to individual candidates." This change in focus demonstrates that "Congress was doing something different in [Section 312(a)(7)] and supports the view that the legislators were creating a new right for individual candidates when they passed that provision" (*id.* at 16a; footnote omitted).

The court of appeals also held that, in implementing Section 312(a)(7), the Commission "articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access" (Pet. App. 54a). The court rejected the argument that determination by the Commission of when statutory obligations attach, *i.e.*, when broadcasters must begin affording

reasonable access, was improper (*id.* at 24a-29a). It held that "determination of when statutory obligations attach is not an editorial decision * * * [but rather] is purely a legal judgment * * * for which the Commission is better suited than either broadcasters or candidates" (*id.* at 28a-29a). Similarly, the court found no basis for the contention that, in making this decision, the Commission impermissibly involved itself in the election process. It noted that "[t]his would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it ha[d] *already begun*" (*id.* at 27a). The court added that "[b]y confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters" (Pet. App. 29a).

The court of appeals also reviewed the Commission's requirement that broadcasters consider the individual requests of candidates, and concluded that this requirement comported with the rule of reason prescribed by Congress in Section 312(a)(7) (Pet. App. 32a-41a). Applying this requirement, the court agreed with the Commission that the networks had failed to consider the particular request for air time made by the Committee. The court held (*id.* at 39a-40a) that all three networks had "displayed unreasonable disregard for the relevant standards * * * [in adopting] across-the-board policies [which] violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster ha[s] to tailor his response to the *individual* candidate."

Finally, the court of appeals found no basis for the contention that Section 312(a)(7), as implemented by the Commission, unconstitutionally re-

stricts the editorial discretion of broadcasters (Pet. App. 42a-47a). The court noted that Section 312 (a) (7) applies only to a narrow and clearly defined class of beneficiaries—legally qualified candidates for federal elective office. Moreover, the statute grants access only for the prescribed purpose of advocating the candidate's election to office, and statutory obligations apply only during the political season when the campaign is fully underway. The court also noted that the Commission has articulated standards to assist broadcasters in determining which requests for access should be honored, and has limited its review to a consideration of whether broadcasters reasonably have applied those standards (*id.* at 46a). In conclusion, the court of appeals emphasized (Pet. App. 46a-47a; footnote omitted):

> The right of "use" granted to the candidate under section 312(a)(7) does not confer on the candidate any right to interfere with what the broadcast journalist says or does on the air. Similarly, the broadcast journalist may not determine what the candidate says or does with the limited amount of air time available to him. Therefore, Section 312(a)(7) represents only a congressional reallocation of the "use" of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired.

In a concurring opinion, Judge Tamm warned against applying the statute to "favor[] one speaker or viewpoint over another" (Pet. App. 67a). Having pointed out the need to avoid that danger, Judge Tamm agreed that the statute, as implemented by the Commission, was fully consistent with constitutional requirements. Judge Tamm reached that conclusion

because "section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), because "we dare not forget that there is also a potential for evil in leaving the question of access in the hands of private broadcasting interests" (*id.* at 65a-66a), and because "the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity" (*id.* at 67a).

SUMMARY OF ARGUMENT

I.

The affirmative access provision prescribed by Congress in 1972, 47 U.S.C. 312(a)(7), imposes on broadcasters a duty to afford "reasonable amounts of time" to "a legally qualified candidate" for federal elective office, who seeks "use of a broadcasting station" to advocate "his candidacy." Repeated failure to afford reasonable access to such a candidate—or even a single episode of willful withholding—subjects the broadcaster to sanctions. The literal terms of the statute leave no room to doubt that Congress intended to protect individual candidates against unreasonable denials of air time. Congress' focus on "a" candidate, seeking the "use" of "a broadcasting station" to advocate "his candidacy," shows plainly that individual candidates were intended to have legally protected rights. This new statutory obligation differs markedly from the Commission's prior "public interest" policy, which merely required broadcasters to make some time available for political programming, and which offered no protection of any kind to individual candidates.

Construing the statute literally to afford affirmative rights to individual candidates involves no break

with historical tradition. Since the inception of radio regulation in 1927, Congress has treated political broadcasting on a special basis. Individual candidates traditionally have enjoyed the right to "use" broadcast stations to reply to their rivals. Broadcasters never have had editorial control over the format or content of such political broadcasts. Furthermore, the general "public interest" obligation always has required broadcasters to offer some political programming, notwithstanding their contrary wishes. The obligation created by Section 312(a)(7) is a natural outgrowth of that requirement.

Events preceding the enactment of Section 312 (a)(7) demonstrate clearly that Congress intended to expand candidate access to the airwaves. Between 1960 and 1971, numerous bills were proposed in Congress that sought to alter the status quo and give candidates a greater opportunity to broadcast their views. And when, in 1972, Congress enacted Section 312(a)(7), it unambiguously stated the objective: to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971). Far from contradicting the literal terms of the statute, the legislative history shows that Congress intended to expand candidate access to broadcast stations and that it understood that it was vesting individual candidates with affirmative access rights.

Following its enactment, the Commission consistently has interpreted Section 312(a)(7) to superimpose upon the general "public interest" requirement a new obligation, which vests rights in individual candidates. That consistent administrative interpretation is entitled to substantial judicial deference under

familiar principles. Moreover, the Commission's views have been explained to Congress and approved by the Senate Subcommittee responsible for communications. Congress has considered complaints from broadcasters about the operation of Section 312(a)(7), but has declined to amend the statute or to disturb the administrative contruction. Accordingly, deference to the agency's view is "particularly appropriate" because the "agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

Although the networks rely heavily on this Court's decision in *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-114 n.12 (1973), that case did not consider or decide the question presented in this case. In the course of its opinion, the Court had occasion to contrast the treatment afforded political candidates and private citizens under the Communications Act. In pointing out the differences between the access granted to candidates and private citizens, it referred to Section 312(a)(7) and stated generally that it "essentially" codified prior law. The Court did *not* state or imply that the new statute was in all respects coextensive with prior doctrine, or that it imposed no new duties or obligations.

II.

The Commission correctly determined that the networks denied reasonable access in this case. Contrary to legal requirements clearly set forth in the Commission's earlier rulings under Section 312(a)(7), the networks simply applied blanket, preconceived policies and dismissed out of hand the candidate's request for one half-hour of time during December 1979. The networks afforded the request no

individualized attention, and made no attempt to accommodate the stated requirements of the candidate. Moreover, the business justifications offered by the networks for their withholding lacked any factual basis. As the Commission expressly found, there was no realistic possibility of a large number of requests for equal time if the candidate's request was honored, and no claim of program disruption could logically be predicated upon a request for air time made two months in advance, which specified four alternative days.

The Commission has reasonably exercised its authority to interpret the statute and prescribe conditions for its application by determining that access rights do not vest until the campaign is fully underway. That interpretation benefits broadcasters. In the absence of such a limiting interpretation, the statute would apply whenever a legally qualified candidate demanded reasonable access. In determining when a campaign is fully underway, the Commission renders a legal judgment based on objective facts. It does not review the contents of any program or exercise an "editorial" function. Nor does it trigger the onset of the campaign; to the contrary, the Commission's determination is triggered by the existence of substantial campaign activities, as evidenced by objective, extrinsic facts.

The Commission did not exceed its authority by requiring broadcasters to consider the individual requests of candidates. The Commission has not insisted that broadcasters attempt to second-guess the requests of candidates, or pass judgment on the wisdom of their media strategy. Rather, it has required broadcasters to consider the stated requests of candidates and attempt, in good faith, to accommodate those requests with their own business concerns. This

requirement is aimed essentially at the situation presented in this case—in which the broadcasters dismissed out of hand the candidate's request based on preconceived, blanket policies. Such an approach, if condoned, would permit broadcasters to decide unilaterally what may be said by candidates and when, without attention to the particular media strategy candidates believe to be best adapted to reaching their intended audience.

III.

As Judge Tamm observed (Pet. App. 65a), Section 312(a)(7), as interpreted by the Commission, "makes a tremendous positive contribution to the cause of freedom of expression." It facilitates the First Amendment right of each candidate "tirelessly to advocate his own election." *Buckley* v. *Valeo*, 424 U.S. 1, 52 (1976). And it implements the First Amendment right of voters in the viewing and listening audience to receive information necessary "to make informed choices among candidates for office." *Id.* at 14-15. In the broadcast context, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). That principle has particularly great relevance in a case such as this, which involves the right of viewers and listeners to obtain information that is essential to the proper functioning of representative government.

In enacting Section 312(a)(7), Congress balanced the First Amendment rights of candidates, voters, and broadcasters. And it arrived at a fair accommodation —it prescribed a right of "reasonable access." The enactment reflects the well-established legal principle that broadcasters have no First Amendment right to "monopolize a radio frequency" to the exclusion of

political candidates (*Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 389). Congress may require a licensee to "share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which * * * otherwise, by necessity, [would] be barred from the airwaves" (*ibid.*). These principles strongly confirm the constitutionality of Section 312(a)(7), as construed by the Commission, which temporarily reallocates the "use" of the frequency from the broadcaster to the candidate.

The facts of this case show that the Commission paid appropriate deference to the discretion of the networks. It did not second-guess any attempt to accommodate the needs of the candidate and it did not reject any claim of business necessity resting on a valid factual basis. It merely determined that the conduct of the networks was unreasonable, since they ignored the stated request of the candidate and offered no tenable justification for their denial of access. Despite this conduct, which contravened the Commission's long-standing interpretation of Section 312(a)(7), the Commission imposed no sanctions. It merely directed the networks to state how they would comply with the statute. The Commission has thus applied the statute with sensitivity and restraint, and there is no basis for speculating that it will do otherwise in the future.

ARGUMENT

I. SECTION 312(a)(7) OF THE COMMUNICATIONS ACT IMPOSED ON BROADCASTERS A NEW OBLIGATION TO AFFORD REASONABLE ACCESS TO INDIVIDUAL CANDIDATES SEEKING FEDERAL ELECTIVE OFFICE

Petitioners CBS and NBC contend that Section 312 (a) (7) merely codified policies developed by the Commission under the public interest standard of the Communications Act prior to 1971, and that it did not impose any additional obligations on broadcasters (CBS Br. 14-34; NBC Br. 37-49).[7] The plain language of the statute, however, clearly shows that Congress fashioned a new right of access for individual candidates seeking reasonable amounts of broadcast time. Although it is unnecessary to look beyond the statutory text to affirm the Commission and the court of appeals in this case, we also demonstrate below that their interpretation is supported by the structure of the statute and its legislative history, as well as the Federal Communications Commission's consistent administrative construction.

A. The Language of Section 312(a)(7) is Unambiguous

In response to the networks' arguments about the intended scope of Section 312(a) (7), we submit that "this is a case in which the meaning of [the] statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction." *United States* v. *Clarke*, 445 U.S. 253, 254 (1980). Giving the

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[7] ABC appears to take a different view. See ABC Pet. 7: "Section 312(a) (7) confers on federal candidates a certain limited right to broadcast time that licensees are obligated to honor. This petition does not challenge that obligation." See also Pet. App. 22a.

words used by Congress "their ordinary, contemporary, common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), there can be no doubt that Congress imposed on broadcasters an obligation to grant individual candidates for federal office a right of reasonable access.[8]

Section 312(a)(7) authorizes the Commission to impose the sanction of license revocation based on a broadcaster's willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time "for the *use* of *a broadcasting station* by *a legally qualified candidate* for Federal elective office *on behalf of his candidacy*" (emphasis supplied). Congress did not prescribe a duty merely to provide some measure of political programming in general. Congress focused on the individual candidate: "*a* legally qualified candidate" is given a right, enforceable by government sanction, to a specific "use" of "*a* broadcasting station" to advocate "*his* candidacy."[9]

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[8] While the briefs of the networks dwell at great length on legislative history, they fail to come to grips with the literal language of the statute itself. That approach ignores this Court's repeated admonition that "'[t]he starting point in every case involving construction of a statute is the language itself.'" *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979) (citations omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania*, No. 79-521 (June 9, 1980), slip op. 5. See also *Harrison* v. *PPG Industries*, No. 78-1918 (May 27, 1980) slip op. 13; *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 6.

[9] In the present case, the Commission ruled on the candidate's complaint alleging a violation of Section 312(a)(7). The Commission's adjudication of individual complaints and

Applying these statutory terms literally, it follows that the Commission may impose the sanction of revocation based on a single episode of "willful" failure to afford a reasonable amount of air time to a candidate. And, if an unreasonable denial of air time is "repeated"—that is, it occurs more than once—the sanction of revocation may be imposed even in the absence of a showing of willfulness. In short, the statute focuses not only on the individual candidate, but also authorizes the Commission to impose sanctions even in the case of a single instance of willful withholding.[10]

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its issuance of orders is in aid of its ultimate authority to impose sanctions under Section 312(a)(7)—if sanctions should prove to be necessary—and is consistent with its express authority to issue orders and prescribe conditions reasonably necessary to enforce the statute. See 47 U.S.C. 154(i), (j), 303(r); 47 C.F.R. 1.2, 1.89. See also *FCC* v. *WJR*, 337 U.S. 265, 282 (1949); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 372 n.3 (1969); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 730 (1978). Broadcasters have urged the Commission to act upon individual complaints in this manner rather than awaiting renewal or revocation hearings. See *Fairness Report*, 48 F.C.C.2d 1, 18 (1974), reconsideration denied, 58 F.C.C.2d 691 (1976), aff'd in relevant part, *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095, 1115-1116 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

[10] We do not suggest that the Commission should exercise its authority to impose sanctions based on relatively isolated or good faith violations of the statute. Indeed, the Commission never has imposed sanctions on any broadcaster based on a violation of Section 312(a)(7). As discussed on pages 66-69, *infra*, the Commission has taken effective steps to minimize the need for sanctions in this area. In this case, for example, the Commission encouraged the parties to negotiate their differences after it reiterated the applicable legal standards (Pet. App. 101a & n.34). Moreover, after finding a violation, it merely directed the networks to advise it of what steps they would take to assure compliance (*id.* at 142a).

This specific statutory duty stands in marked contrast to the broadcaster's more limited duty under the general "public interest" policy. Under that policy, broadcasters wishing to assure renewal of their licenses were expected, among other things, to make judgments about the importance of particular campaigns, and, on that basis, to decide which campaigns and which candidates should be given air time. The requirement was that *some* time be given to political broadcasting, but no individual candidate could claim a personal right of access in the absence of a broadcast by his rival, and no distinction was drawn between local, state, and federal elections.[11] In sum, unlike the general public interest policy, the express terms of Section 312(a)(7) prescribe special access rights for individual candidates.[12]

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[11] See *Enbanc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960); *Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1093-1095 (1963); *Lew Breyer*, 31 F.C.C.2d 548 (1968); *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 535-538 (1972); *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1088. As summarized in the Commission's *New Primer on Political Broadcasting & Cablecasting*, 69 F.C.C.2d 2209, 2286 (1978), Section 312(a)(7) "does require [broadcasters] to permit [reasonable] access to all candidates for Federal office if the candidates request it." The public interest standard, in contrast, permits broadcasters to "use [their] judgment as to which races are most significant and of greatest interest to the public, and refuse to sell or give time for 'uses' of the station by candidates for other offices." *Id.* at 2290 (footnote omitted).

[12] The candidate's right to protection against unreasonable denials of air time is the converse of the broadcaster's duty, upon pain of government sanction, to afford reasonable access to individual candidates. The candidate enforces the right through the ordinary process of filing a complaint with

The plain terms of the statute further demonstrate that Congress was not simply codifying the prior "public interest" standard because the statute applies only to candidates seeking "Federal elective office." The public interest standard, in contrast, applied to candidates for *all* offices, and continues to govern broadcaster obligations with respect to state and local candidates. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2290. If Congress had intended merely to codify the preexisting public interest obligation, there would have been no need to limit the statute to federal candidates; indeed, such a limitation would be inexplicable.[13] Thus, as the court of appeals pointed out (Pet. App. 16a), the plain terms of the statute show that "candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine."

B. The Statutory Scheme and Legislative History Support a Literal Interpretation of Section 312(a)(7)

While the literal terms of Section 312(a)(7) are so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)), an examination of the statutory scheme and the legislative history strongly

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the Commission. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2212-2215.

[13] Congress did not extend the new obligation prescribed under Section 312(a)(7) to state and local candidates because an individual right of access vested in those candidates, as well as federal candidates, would have placed impractical burdens on broadcasters. See *Political Broadcasting—1970: Hearings on H.R. 13721, S. 3637 and Others Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 23 (1970).

reinforces the literal interpretation adopted by the Commission and the court of appeals in this case.

1. In enacting Section 312(a)(7) in 1972 to prescribe a right of access for individual federal candidates, Congress did not write on a clean slate. From the very beginning of the regulation of radio and television, Congress has regulated "uses" of the airwaves by political candidates under a regime that differs from that applicable to broadcaster presentations of public issues. As discussed on pages 22-23, *supra*, the "public interest" standard has long imposed on broadcasters a duty to provide access to some candidates for political uses. And, since the enactment of Section 18 of the Radio Act in 1927, ch. 169, 44 Stat. 1170, Congress has required broadcasters to provide an equal opportunity of reply to candidates after their rivals make public appearances over the airwaves. The equal opportunity doctrine, which today is codified in 47 U.S.C. 315(a), has always imposed on broadcasters a special duty to carry political programming regardless of their editorial views and with no censorship of the contents of the programming allocated to political candidates. Thus, Congress has prescribed that, in the field of political programming, the candidate—and not the broadcaster—would be the ultimate judge of program content.[14]

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[14] See *Farmers Union* v. *WDAY*, 360 U.S. 525, 527-531 (1959). The right of candidates to be the ultimate judge of what is presented was intended to be a safeguard against abuses of editorial control by broadcasters. See *id.* at 529-530. In thus divesting broadcasters of their usual editorial control in the context of political broadcasting, Congress fully recognized that it was imposing special obligations on them. See *Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, *supra*, 40 F.C.C. at 1090 (discussing the legislative history).

The distinct treatment afforded to political broadcasting is highlighted by the fact that, both in 1927 and 1934, Congress specifically considered but firmly rejected suggestions that the equal opportunity requirement be extended to cover general public issue programming as well as political broadcasts by candidates. See 67 Cong. Rec. 12501-12505 (1926); H.R. Conf. Rep. No. 1918, 73d Cong. 2d Sess. 49 (1934); see also *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 104-108 (1972).[15]

Thus, the pertinent feature of the historical background, against which Section 312(a)(7) was enacted, is Congress' different treatment of general broadcasting and political broadcasting. In contrast to general programming, political programming al-

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[15] Events following the adoption of the 1934 Act also illustrate the distinctive treatment afforded to political broadcasting. In 1952, Congress adopted a provision restricting the rates that broadcasters could charge political candidates. Act of July 16, 1952, ch. 879, Section 11, 66 Stat. 717 (amended by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Section 103(a)(1), 86 Stat. 4). In 1959, it acted promptly to correct what it viewed as a misinterpretation of the equal opportunities provision. See *Political Broadcasting: Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st. Sess. 1-2 (1959). On that occasion, when it adopted four exemptions to Section 315 for news-type programs (see 47 U.S.C. 315(a)), Congress declared its intent to review regularly the operation of Section 315 and required annual Commission reports on the application of the statute as amended. Communications Act Amendment of 1959, Pub. L. No. 86-274, Section 2, 73 Stat. 557. There is no other area of broadcast programming over which Congress has exercised such thorough oversight and has so pervasively regulated broadcaster discretion.

ways has been surrounded with special statutory obligations. Under Section 315 and its predecessor, broadcasters have been required, upon request, to provide rival candidates with specific amounts of time with *no* control over program content or format. Congress, therefore, rather than the licensee, has allocated a substantial portion of the broadcast frequency for political "uses." In this context, the prescription of a duty to afford "reasonable access" to individual federal candidates was not a dramatic change in statutory policy. Section 312(a)(7) represented only a limited extension of the contingent right of access that Congress traditionally provided for individual political candidates. It also represented a natural evolution of the previously recognized "public interest" requirement, which compelled broadcasters to make some program time available in the first instance for political candidates.[16]

2. The Commission's literal interpretation of Section 312(a)(7) is confirmed not only by the historic approach of Congress to political programming, as discussed above, but also by the events that preceded enactment of Section 312(a)(7). Section 312(a)(7)

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[16] In reliance on 47 U.S.C. 153(h), petitioners argue that they should not be deemed to be "common carriers." See ABC Br. 31 n.39; CBS Br. 17-19; NBC Br. 31. We agree that they are not common carriers for the general public. They are, however, "special carriers" for political programming under prescribed circumstances, and have been so ever since 1927. Under Section 18 of the Radio Act of 1927, ch. 169, 44 Stat. 1170, and Section 315 of the Communications Act, 47 U.S.C. 315, Congress has required broadcasters to relinquish "uses" of their stations for political replies, has deprived broadcasters of editorial control over those broadcasts, and has regulated the rates they may charge.

represented the culmination of a legislative process covering more than a decade. Following the 1959 amendments to Section 315 of the Act (see note 15, *supra*), demands mounted in Congress for increased media access for political candidates. In 1960, a bill was introduced in the Senate that would have required television stations to make specific amounts of free time available to presidential candidates. S. 3171, 86th Cong., 2d Sess. (1960). During hearings on that bill, Senator Pastore expressed disapproval of the policies of some stations that had refused requests for political time. *Presidential Campaign Broadcasting Act: Hearings on S. 3171 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 59-60 (1960). Subsequent hearings also focused on the Commission's inability to protect individual candidates seeking access. See *Political Broadcasting: Hearings on S. 204 and others Before the Communications Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 141-146 (1962) (remarks of Chairman Minow) ("we do not presently have authority to say to a station 'you must put on candidate X' "). Once again, in 1967, a bill that would have required free access time for state and local, as well as federal candidates, was proposed. S. 1548, 90th Cong., 1st Sess. (1967). See *Projections—Predictions of Election Results and Political Broadcasting (Sec. 315, Communications Act): Hearings on S. 1548 and others Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 174-175 (1967). When that attempt to fashion increased access rights failed, thirty-eight Senators co-sponsored another bill (S. 2876, 91st Cong., 1st Sess. (1969)), which would have required that specific amounts of television time be sold to Congressional candidates at discount rates. See *Cam-*

paign Broadcast Reform Act of 1969: Hearings on S. 2876 and Others Before the Communications Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. 4-9 (1969); see also *id.* at 47-50 (remarks of Chairman Hyde). In 1970, both houses of Congress passed S. 3637, 91st Cong., 2d Sess. (1970), a bill which, *inter alia*, would have regulated expenditures for political broadcasts. As amended on the floor of the Senate (116 Cong. Rec. 11593 (1970)), S. 3637 would have declared that "consistent with the other needs of the community broadcast licensees shall make a reasonable amount of time available for legally qualified candidates for federal elective office between the hours of 7:30 and 10:30 [P.M.]."

This bill was subsequently vetoed by the President (S. Doc. No. 91-109, 91st Cong., 2d Sess. (1970)). The subject of campaign reform was again taken up, however, in 1971. Three bills were introduced in the Senate—S. 1, S. 382, and S. 956—measures, which, in different ways, were "intended to increase a candidate's accessibility to the media * * *." *Federal Election Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 2 (1971) (remarks of Senator Pastore). S. 1 would have required each broadcaster to "make available without charge the use of its facilities * * * to candidates in a presidential election for the offices of President and Vice President * * *" S. 1, 92d Cong., 1st Sess. § 202 (1971). Certain candidates would have received free of charge "eight one-half hour periods of prime time from each such station and network * * *." *Ibid.* S. 956, by contrast, would have granted the Commission a broad power to issue rules "to insure that all licensees make available to legally qualified candidates for public office reasonable amounts of time for use of broadcasting

stations * * *." S. 956, 92d Cong., 1st Sess. § 302 (1971).

Rather than adopting either S. 956 or S. 1, however, the Senate Commerce Committee and Rules and Administration Committee approved S. 382, but inserted within it the language appearing today in Section 312(a)(7).[17] As discussed on pages 19-23, *supra*, the language deliberately chosen by Congress prescribed a new obligation requiring broadcasters to provide federal candidates with reasonable access to the airwaves. In contrast to some of the bills previously considered by Congress (see pages 27-28, *supra*), the language ultimately selected left no doubt concerning the legislative intent to protect *individual* candidates.[18]

3. Although the contemporaneous commentary on Section 312(a)(7) in the legislative history is limited, that commentary also supports the view that Congress sought to prescribe a new affirmative right of access for candidates seeking federal elective office. In summarizing one of the leading purposes of Title I of the new statute—the title which contained Section 312(a)(7)—Congress stated that it (emphasis supplied):

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[17] As reported in the Senate, the text of the new access provision was sweeping. It applied to "any legally qualified candidate on behalf of his candidacy." S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22 (1971); S. Rep. No. 92-96, 92d Cong., 1st Sess. 3 (1971); S. Rep. No. 92-229, 92d Cong., 1st Sess. 5 (1971). The Conference Committee limited the provision only in one respect—by confining it to candidates seeking *federal* elective office. S. Conf. Rep. No. 92-580, *supra*, at 22.

[18] Section 312(a)(7) was enacted as part of Title I of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

> attempts to give candidates for public office *greater access to the media* so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.

S. Rep. No. 92-96, *supra*, at 20. The Committee plainly was referring to Section 312(a)(7) when it recited the statutory purpose of affording "greater access to the media" for political candidates. The correlation between that purpose and the plain text of Section 312(a)(7) is, we submit, obvious and compelling.[19]

Subsequent portions of S. Rep. No. 92-96 further establish that Congress understood that it was superimposing a new obligation on the prior "public interest" requirement. The Senate Report separately describes the newly prescribed obligation,[20] and dis-

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[19] Petitioners assert that, because Section 312(a)(7) was not specifically mentioned in conjunction with this statement of purpose, and other portions of the statute were discussed by the Committee shortly thereafter, it necessarily follows that the statement of purpose has no relationship to Section 312(a)(7). However, the short summary of statutory provisions appearing on page 21 of the Senate Report obviously is not exhaustive. The Report's subsequent, more detailed summary of the provisions in Title I includes repeated references to Section 312(a)(7). See S. Rep. No. 92-96, *supra*, at 34, 38.

[20] The Report states (*id.* at 34):

> [The new Section 312(a)(7)] provide[s] that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a legally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.

Section 312(a)(7) sought to "emphasize" (*id.* at 28) the duty to afford access to federal candidates by focusing on them individually, rather than generally. Vesting candidates with

tinguishes it from the "general" public interest requirement.[21] Moreover, during floor debates on the Conference Report that was submitted to the House, it also was recognized that the new Section 312(a)(7) imposed significant new obligations on broadcasters and afforded rights to individual candidates. See 118 Cong. Rec. 326 (1972) (remarks of Rep. Keith).

The final, and in our view conclusive, piece of evidence of legislative intent appears in Congress' contemporaneous amendment of Section 315(a) of the Act, 47 U.S.C. 315(a). That amendment was described by the Senate Conference Committee as "a conforming amendment" required by the enactment of the new Section 312(a)(7). See S. Conf. Rep. No. 92-580, *supra*, at 22; accord, H.R. Conf. Rep. No. 92-752, 92d Cong., 1st Sess. 22 (1971). The text of Section 315(a), prior to the "conforming amendment," was as follows (47 U.S.C. (1970 ed.) 315(a)):

> No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

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individual rights directly served the statutory purpose to "enable *all* who seek such office to have a *better* opportunity to do so" (*id.* at 26; emphasis added).

[21] The Report gives separate treatment to the general public interest obligation previously recognized by the Commission (S. Rep. No. 92-96, *supra*, at 34):

> The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [community] of license. The Federal Communications Commission has recognized this obligation * * *.

Congress intended that this "general" public interest requirement would "continue" to be enforced at three year intervals in the license "renewal" context, not in license revocation proceedings (*id.* at 28).

As a result of the conforming amendment, however, Section 315(a) now contains an important qualification (47 U.S.C. 315(a) (emphasis supplied)):

> No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate.

It was necessary for Congress to qualify its statement that there was "no obligation" to afford individual access—and to make it clear that that statement applied only under Section 315(a)—precisely because the newly enacted Section 312(a)(7) *does* require broadcasters to afford individual access. In short, as the court of appeals explained (Pet. App. 18a), "[i]f Section 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to Section 315 would have been required." [22]

Thus, far from contradicting the literal terms of Section 312(a)(7), the legislative history provides additional support for the literal interpretation adopted by the Commission and the court of appeals.

C. The Commission's Consistent Administrative Construction, Which Has Been Brought to the Attention of Congress, Confirms the Appropriateness of a Literal Interpretation of Section 312(a)(7)

As this Court frequently has held, the construction of a statute by those charged with its administration "should be followed unless there are compelling indi-

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[22] The networks suggest (CBS Br. 30 n.70; NBC Br. 45 n.*) that Congress merely intended its amendment of Section 315(a) to restore certain language appearing in the Statutes at Large, but omitted from the United States Code. That theory, however, has virtually no support in the legislative history, and is contradicted by Congress' explicit statement that the amendment was a "conforming" amendment needed to bring Section 315(a) into harmony with the newly enacted Section 312(a)(7).

cations that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121-123, 125, (1973); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-566, 568 (1980). Deference to the agency's interpretation "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979). These settled principles of statutory construction reinforce the view that Section 312(a)(7) created a new right of individual access for federal candidates.

Immediately following the enactment of Section 312(a)(7), and up until the present time, the Commission consistently has construed the statute to impose a new obligation on broadcasters to afford access to individual federal candidates. The Commission repeatedly has determined that this obligation extends beyond the prior public interest policy. See *Use of Broadcast & Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 535-538 (1972) (*"1972 Policy Statement"*); *Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516-517 (1974) (*"1974 Public Notice"*); *1978 Report and Order, supra*, 68 F.C.C. 2d at 1088; *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2286, 2290.[23]

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[23] It is difficult to understand the basis for the networks' attempt to fault the Commission (ABC Br. 33-37; CBS Br. 32-34) for inconsistency in construing the statute. In its first published statement about the statute, the Commission made it clear that Section 312(a)(7) imposes a new "specific re-

The Commission's interpretation has been brought to the attention of Congress and has been discussed with approval by Senator Pastore, the Chairman of the Communications Subcommittee of the Senate Commerce Committee.[24] In 1973, the Senate Subcommittee on Communications held hearings to review the operation of the Federal Election Campaign Act of 1971. See *Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973) (*"Hearings on S. 372"*). As the court of appeals pointed out (Pet. App. 19a), Commission Chairman Dean Burch testified concerning the Commission's experience with Section 312(a)(7) and supplied the Committee with its *1972 Policy Statement*, which had construed the statute "to impose[] on the overall obligation to operate in the public interest the additional specific requirement that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office." See 34 F.C.C.2d at 538; *Hearings on S. 372*,

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quirement" on broadcasters in addition to the general "public interest" obligation and that blanket refusals to sell time to candidates could not be countenanced. *1972 Policy Statement*, *supra*, 34 F.C.C.2d at 538. The Commission reiterated this position in the *1974 Public Notice*, *supra*, 47 F.C.C. 2d at 516-517, and in the *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1088. The Commission's rulings on individual complaints have adhered to the same view of the statute from the beginning. See, *e.g.*, *Robert H. Hauslein*, 39 F.C.C.2d 1064, 1065 (Broadcast Bureau 1973); *Summa Corp.*, 43 F.C.C.2d 602, 603-605 (1973); *Don C. Smith*, 49 F.C.C.2d 678, 679-680 (Broadcast Bureau 1974); *Ken Bauder*, 62 F.C.C.2d 849 (Broadcast Bureau 1976); *Labor Party*, 67 F.C.C.2d 589 (1978).

[24] Senator Pastore presided since 1959 over all of the Communications Subcommittee Hearings dealing with candidate access bills and was floor manager of the Federal Election Campaign Act of 1971 (see pages 27-28, *supra*).

supra, at 137. Chairman Burch also discussed in detail the practical problems implicit in attempting to decide whether, in a particular case, an individual station has afforded reasonable access to a particular candidate. *Hearings on S. 372, supra*, at 137. After advising the Subcommittee of the Commission's interpretation of the statute and its experience in applying it, Chairman Burch stated: "We have brought our approach to these problems in the form of the 1972 Public Notice to the attention of Congress. If we have erred in some important construction, we would, of course, welcome congressional guidance." *Ibid.* Senator Pastore replied (*ibid.*):

> Let me say this. We didn't draw the provision any differently than we did because when you begin to legislate on guidelines, and on standards, and on criteria, you know what you run up against. I think what we did was reasonable enough, and I think what you did was reasonable enough as well.
>
> I know it is a difficult problem to say what is reasonable. You have to take everything into consideration. You couldn't cancel all other programs that the public might be interested in, just to accommodate all the candidates.
>
> Yet, on the other hand, there is the question of giving sufficient time. In some instances, especially since there is a lowest unit rate, some licensees have been rather reluctant to give adequate time.
>
> I would suppose that in cases of that kind, you would get some complaints.[25]

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[25] While the Commission and Senator Pastore expressed their satisfaction with the operation of the new access provision, network officials complained about its intrusive effect. CBS Vice Chairman Frank Stanton objected to the fact that "section 312 grants rights to all legally qualified candidates for Federal office * * *." *Id.* at 190. Despite the complaints

Congress revisited the subject of federal election campaign reform in 1974. The Federal Election Campaign Act Amendments of 1974, among other things, repealed the expenditure limitations prescribed in Title I of the 1971 legislation. See Pub. L. No. 93-443, Section 205(b), 88 Stat. 1278. Although Section 312(a)(7) also had been enacted as part of Title I, it was not altered by Congress and the administrative construction of the statute was left undisturbed.[26]

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of broadcasters, the Senate Commerce Committee approved the Commission's administration of Section 312(a)(7). Chairman Burch assured the Committee that the Commission would continue to consider "complaints on an *ad hoc* basis as actual cases arise." The Committee stated: "Your Committee believes that testimony submitted for the record by the Chairman of the FCC should allay any fears that the provisions of section 312(a)(7) might work a hardship on a good faith licensee or otherwise adversely surprise him." S. Rep. No. 93-170, 93d Cong., 1st Sess. 6-7 (1973). See also *id.* at 7-8. Network officials continued in subsequent years to object in Congress that Section 312(a)(7) "unduly intrudes" upon editorial discretion. *First Amendment Clarification Act of 1977: Hearings on S. 22 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation,* 95th Cong., 2d Sess. 67 (1978). Still later, the House Communications Subcommittee was advised of the manner in which the Commission had interpreted Section 312(a)(7) in the instant case and expressed no disapproval. See *Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. 42 (1980). Counsel for the subcommittee agreed with the view that Section 312(a)(7) creates a right of access for *individual* federal candidates. *Id.* at 43.

[26] Since 1974, Congress has considered proposals to repeal Section 312(a)(7), but has declined to change the statute or the administrative interpretation. See S. 1178, 94th Cong., 1st Sess. § 2 (1975), introduced at 121 Cong. Rec. 6446, 6454-6458 (1975), hearings held, *Fairness Doctrine: Hearings on S. 2, S. 608, and S. 1178 Before the Communica-*

In light of the consistent interpretation rendered by the Commission and Congress' continuing oversight of this widely discussed provision, "Congress' failure to repeal or revise" Section 312(a)(7) "in the face of such administrative interpretation [provides] persuasive evidence that that intepretation is the one intended by Congress." *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); accord, *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381; *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956); *Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 8-13.

D. This Court's Decision in *CBS* v. *Democratic National Committee* Does Not Call Into Question the Commission's Interpretation of Section 312(a)(7)

In support of their view that Section 312(a)(7) did nothing more than merely restate the "public interest" requirement imposed on broadcasters prior to its enactment (see page 22, *supra*), the networks cite (ABC Br. 21-22; CBS Br. 14-15; NBC Br. 37-40) this Court's decision in *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 113-114 n.12. In that case, the Court observed in a footnote discussion that Section 312(a)(7) had "essentially codified" prior Commission policy. Once again, however, the networks misapprehend the meaning of the language in question. The Court in *Democratic National Committee* did *not* say that Section 312(a)(7) imposed no new duties, and it did not imply that

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tions Subcomm. of the Senate Comm. on Commerce, 94th Cong., 1st Sess. (1975); S. 22, 95th Cong, 1st Sess. § 3 (1977), introduced at 123 Cong. Rec. S186-S187 (daily ed. Jan. 10, 1977), 124 Cong. Rec. S8879-S8881 (daily ed. June 8, 1978), hearing held, *First Amendment Clarification Act of 1977: Hearing on S. 22 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. (1978).

Section 312(a)(7) was in all respects coextensive with prior doctrine. The Court said that the statute "essentially" codified prior doctrine,[27] which is correct in the sense that Section 312(a)(7) directly evolved from, was consistent with, and was superimposed upon the predecessor public interest doctrine.

In addition to the fact that this Court qualified its footnote observation as it did, the fact of overriding importance is that the Court was not called upon, and did not purport, to rule on the precise contours of the obligation imposed by Section 312(a)(7). The issue before the Court in *Democratic National Committee* was whether the Communications Act or the First Amendment requires the Commission to force broadcasters to accept paid editorial announcements from the general public. 412 U.S. at 97. The Court held that the Commission need not prescribe such a general access obligation. *Id.* at 121-132. The Court observed "that no private individual or group" has a right to command the use of the airwaves (*id.* at 113), and contrasted that situation with the right of "political candidates" to receive air time (*id.* at 113-114 n.12):

> Very recently, Congress amended § 312(a) of the 1934 Act to authorize the Commission to revoke a station license for "willfull or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." * * * This amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates.

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[27] The word "essentially" denotes some correspondence, not an identical relationship. Its synonym is "substantially." See *Oxford English Dictionary* 296 (1933).

Thus, read in context, it is clear that the Court intended merely to contrast the special treatment afforded "political candidates" under the Communications Act with the treatment afforded any "private individual or group." [28] The Court did not attempt to decide the question presented in this case—whether Section 312(a)(7) vests individual candidates with an affirmative right of access.[29]

Finally, even if there were some discrepancy between the Court's discussion of Section 312(a)(7) in *Democratic National Committee* and the literal terms

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[28] As the court of appeals explained, the point of this Court's discussion in *Democratic National Committee* was that "one limited class of speakers, political candidates, has a stronger claim to the airwaves than do citizens at large" (Pet. App. 21a).

[29] In its brief before this Court in *Democratic National Committee* (Br. 42-43 n.37), the Commission also referred to Section 312(a)(7) as a form of codification of the prior public interest standard. However, the point of the Commission's discussion was simply that, with the exception of political programming, Congress has not required broadcasters to serve as common carriers. The Commission's brief did not purport to render an interpretation on the issue now before the Court. Moreover, the relevant statement of administrative views appears in the Commission's formal interpretations, not in appellate briefs dealing with other issues. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-628 (1971). As previously noted, the Commission's consistent interpretation of the statute—an interpretation beginning in 1972 and continuing to the present day—is that Section 312(a)(7) imposed a new obligation on broadcasters to afford individual access for federal candidates. As CBS recognized in its brief filed in this Court in *Democratic National Committee* (Br. 30-31 n.72), Section 312(a)(7) "represents the first time that Congress has created a specific individual right to purchase broadcast time that does not depend upon a previous use by opposing candidates."

of the provision (as discussed on pages 19-23, *supra*) it is obvious that the plain meaning of the statute would be controlling. As the Chief Justice, writing for the Court in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979), recently observed, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." Accordingly, while a paraphrase of the statute was useful for purposes of the Court's discussion in *Democratic National Committee*, there is no substitute for a literal application of the language of Section 312(a)(7) in resolving the question of statutory interpretation presented in this case.[30]

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[30] The networks also argue that, because the Federal Election Campaign Act's general goals included shortening campaigns and reducing their costs, the statute should not be construed literally to vest candidates with individual access rights, particularly in the early phase of a campaign (ABC Br. 23-24; CBS Br. 31; NBC Br. 46-47). However, "if the language of a provision * * * is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." *Aaron* v. *SEC*, No. 79-66 (June 2, 1980), slip op. 14-15. Thus, "generalized references" to the "purposes" of the Act do not warrant a departure from its literal text. In any event, the Commission's interpretation does not conflict with those general purposes. The statute achieves the goal of encouraging shorter campaigns by limiting application of the economically beneficial "lowest unit charge" provision to a relatively short time period. See 66 Stat. 717, as amended, 47 U.S.C. 315(b); S. Rep. No. 92-96, *supra*, at 28. That same provision lowers campaign costs by reducing charges for airtime (to a greater degree than prior law) during the period when most political broadcasts occur. Total campaign expenditures were also controlled by the statute, as originally en-

II. THE COMMISSION'S FINDING THAT THE NETWORKS FAILED TO AFFORD REASONABLE ACCESS IS SUPPORTED BY THE RECORD AND IS NEITHER ARBITRARY NOR CAPRICIOUS

As we have explained above, Section 312(a)(7) prescribed a new obligation, requiring broadcasters "to allow reasonable access to or to permit purchase of reasonable amounts of time" by individual candidates seeking to advocate their candidacies for federal office. Thus, Congress has prescribed a rule of reason and it has charged the Commission with responsibility for enforcing it. Neither candidates seeking time, nor broadcasters opposing their requests, possess final authority in cases of disagreement to declare what is "reasonable." [31]

Like the "public interest" standard enforced by the Commission, the rule of reason prescribed in Section 312(a)(7) imposes on the Commission a duty of interpretation. And Congress has vested the Commission with ample power to render interpretations,

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acted, through expenditure limitations. See Pub. L. No. 92-225, Sections 103-106, 86 Stat. 4-8. See also page 36, *supra*. In sum, there is no support whatsoever for the proposition that Congress intended a cramped construction of Section 312(a)(7) to curtail the length of campaigns or their costs. And there certainly is no indication that Congress meant to vest in the networks unilateral power to truncate federal political campaigns for the ostensible purpose of promoting campaign brevity and economy. See *Buckley* v. *Valeo*, 424 U.S. 1, 57 (1976), noting that "the people—individually as citizens and candidates * * * must retain control over the quantity and range of debate * * * in a political campaign."

[31] As previously noted, the Commission expects that, in the great majority of cases, broadcasters and political candidates, applying the Commission's standards in good faith, will negotiate disagreements about access without Commission intervention.

to prescribe conditions, and to issue orders necessary to enforce the statute. See 47 U.S.C. 154(i), (j), 303(r). The Commission's interpretations under Section 312(a)(7) are entitled to substantial judicial deference unless arbitrary or capricious. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-797, 810-811, 814 (1978); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-381; *NBC* v. *United States*, 319 U.S. 190, 216-219, 224-225 (1943); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946).

The networks do not dispute the Commission's authority to interpret Section 312(a)(7) or to issue orders thereunder (Pet. App. 23a). They do, however, assert that certain of the standards prescribed by the Commission fail to implement statutory objectives and intrude unduly on their discretion (ABC Br. 25-37; CBS Br. 34-40; NBC Br. 17-34). In making these contentions, they must sustain a weighty burden. For, as this Court repeatedly has recognized, the Commission is the expert agency in the field of broadcast regulation, and its views are entitled to great respect by the judiciary. *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102-103, 122-123, 131-132. Broad discretion in prescribing such standards is essential if the Commission is to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *Id.* at 120. The networks' burden in challenging the Commission's standards is particularly weighty since those standards have been reviewed and approved by a unanimous court of appeals, which found not only that they were not "arbitrary or capricious," but also that "the standards employed in the orders under

review here represent a very reasonable effort at implementing Section 312(a)(7)" (Pet. App. 42a).

1. The Commission's standards establish the ground rules for evaluating requests for access under Section 312(a)(7). In a nutshell, the standards are as follows. Broadcasters enjoy complete discretion to withhold air time prior to the commencement of a campaign. However, once a campaign has commenced, as evidenced by objective factors, broadcasters must give reasonable and good faith attention to requests for air time from candidates for federal elective office. This requires that they consider each request on an individualized basis. Thus, if a candidate wishes to concentrate limited resources for a single half-hour presentation, rather than several five minute presentations, the broadcaster must consider the stated request and attempt to tailor its response as much as possible to accommodate the request. Broadcasters need not, however, ignore their own legitimate concerns. In making their response, they may consider the likelihood of requests for time from rival candidates under Section 315 of the Act and the magnitude of foreseeable program disruption. Broadcasters may not, however, invoke these considerations as pretexts for denying time and serving their own convenience. They must cite a realistic danger of substantial program disruption or of an unduly large number of requests for equal time. Moreover, broadcasters must explain their reasons for denying time or presenting a limited counter-offer, so that the Commission may determine whether they have considered the relevant factors. If, in fact, broadcasters have considered the relevant factors, and have acted reasonably and in good faith, their decision will be approved even if the Commission itself would have analyzed the question differently in the

first instance. But if they simply have adopted "across the board policies," and have not even attempted to respond to the particular request of the candidate, their denial will not be approved. These, in substance, are the relevant guidelines established by the Commission under Section 312(a)(7). See Pet. App. 86a-101a; 123a-139a; *1978 Report and Order, supra*, 68 F.C.C.2d at 1089-1091, 1094. Far from being patently irrational, it is difficult to perceive how a rule of reason analysis in this area could operate without such principles, or their near equivalents.

Applying these principles to the facts of this particular case, the Commission found that the presidential campaign was fully underway in December 1979 (Pet. App. 88a-94a). It further found that NBC and ABC, by dismissing out of hand the President's request and refusing to offer any time, had applied "blanket," preconceived policies and had not made a good faith attempt to tailor their response to the candidate's stated request (*id.* at 91a, 99a, 125a, 128a-129a, 131a-133a, 137a-138a). Likewise, CBS completely ignored the candidate's particular request when it offered only five minutes to carry a previously prepared one-half hour documentary film, intended to comprehensively summarize the President's record over three years (*id.* at 99a-101a, 129a-131a). Thus, the networks' denial of the request for air time rested on a mistaken interpretation of Section 312(a)(7). By enforcing blanket policies, and by refusing to consider the candidate's request on an individual basis, the networks disregarded the statute's requirements as clearly set forth in the Commission's *1978 Report and Order, supra.*

The candidate's request for air time, moreover, entailed no realistic danger of program disruption. The

request was made more than two months before the intended date of broadcast; the requested half hour could be placed in any time slot in prime time over a four day period; the four day period was selected to avoid affecting network ratings; the candidate offered to pay the normal commercial rate; and the candidate had not previously requested time and anticipated no further requests in the foreseeable future (Pet. App. 97a-98a; J.A. 29-33, 204-205). Furthermore, the networks had no reasonable basis for fearing a significant number of requests for equal time from rival candidates as the Commission expressly found (Pet. App. 95a-96a; J.A. 209-210, 97-98). Finally, although some of the networks sought to justify their actions after the fact by reference to the desires of the candidate, they failed to explain how they had taken the particular request into account and how they had attempted to accommodate it (Pet. App. 129a-133a, 137a).[32] Under these circumstances, the Commission had no alternative but to find that reasonable access had been denied.[33]

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[32] The foregoing is only a brief summary of the elements of the Commission's "reasonable access" analysis. As noted in *FCC* v. *WOKO, Inc., supra*, 329 U.S. at 229, "the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." See also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). A more extensive discussion of the Commission's application of its standards to the facts of this particular case appears in the Commission's brief in the court of appeals at 50-91.

[33] The facts of this case differ substantially from those in the earlier cases on which the networks rely. In *Don C. Smith*, 49 F.C.C.2d 678 (Broadcast Bureau 1974), the Broadcast Bureau determined that a counter-offer of a half-hour in prime

2. The networks nonetheless protest (ABC Br. 24, 37-39; NBC Br. 17-21; CBS Br. 36-39) that the Commission should not have any role to play in determining when the campaign commences.[34] The networks

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time was reasonable, even though the time slot differed from that requested by the candidate. Contrary to CBS' assertion (Br. 39), the Broadcast Bureau did *not* "sustain[]" a counter-offer of "five-minute program periods in response to a request for a half hour." Similarly, in *Donald W. Riegle*, 59 F.C.C.2d 1314 (1976), the broadcaster made a responsive counter-offer, extending five minute segments outside of prime time as well as thirty-minute segments and spots within prime time. Likewise, in *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974), and *WALB-TV, Inc.*, 59 F.C.C.2d 1246 (1976), all of the licensees agreed to sell substantial amounts of time during the "prime time" period.

[34] In its *1978 Report and Order*, the Commission established that "a licensee's obligation to afford reasonable access" does not attach until the campaign is in "full swing." See 68 F.C.C.2d at 1091. The Commission left no room to doubt that it would make determinations of this kind. *Id.* at 1091-1092, 1094. The Commission's willingness to determine when the campaign commences in cases of disagreement is not inconsistent with the *Martin-Trigona* rulings upon which all petitioners rely. See 66 F.C.C.2d 968 (Broadcast Bureau), review denied, 67 F.C.C.2d 33 (1977), reconsideration denied, 67 F.C.C.2d 743 (1978). That case emphasized that "the licensee, *and ultimately the Commission*, must look to the circumstances of each particular case to determine when it is reasonable for a candidate's access to begin as well as the amount and types of access which are reasonable" (*id.* at 746 n.4; emphasis added). See also *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2288 ("The question of * * * when access should apply * * * will be determined by the Commission on a case by case basis.").

NBC suggests (Br. 19-20) that it is somehow more appropriate for the regulated parties—private broadcasters—to determine for themselves when their own access obligations attach than it is for a government body to make such a determination. That view can hardly be squared with Congress'

fail to recognize that the Commission's determination serves to *narrow* the statute's coverage. The statute, on its face, potentially extends access rights to every "legally qualified candidate for Federal elective office." The Commission has done nothing more than establish a limiting condition—intended to give substance to the concept of "reasonable access"—by holding that access rights do not vest until the campaign is fully underway. The statute could, of course, have been construed to vest rights in any federal candidate as soon as he becomes "legally qualified" under the Commission's rules, without regard to the stage of the campaign.[35] By prescribing a condition limiting Section 312(a)(7) to the campaign period, the Commission has confined its impact on broadcasters and has established a reasonable guidepost to govern negotiations between candidates and broadcasters, thereby minimizing the necessity for governmental intervention.[36]

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prescription that unreasonable denials of air time, as adjudicated by the Commission, subject broadcasters to sanctions. Congress not only placed the question of reasonable access in the hands of the Commission, but gave it explicit enforcement powers to assure that broadcasters would comply with their responsibilities.

[35] As NBC points out (Br. 23), several candidates in the 1980 presidential race announced their candidacies very early. The Commission's interpretation reduces the problems caused by such early announcements since, under the Commission's interpretation, a candidate cannot invoke access rights merely by announcing his candidacy and becoming legally qualified. If they desire, broadcasters may refuse to sell time to candidates before the campaign is in full swing.

[36] ABC misses the point in suggesting that the Commission will be required to issue "declarations" as to when a campaign has begun "in literally hundreds of federal congressional or

In the present case, the Commission made an independent evaluation of the status of the presidential campaign based on facts proffered by both the candidate and the networks (Pet. App. 91a-94a).[37] The Commission then rendered "a legal judgment" resting on that objective evidence (Pet. App. 28a). The Commission did not make an "editorial" decision, or otherwise evaluate program content or choice of material.[38] Instead, the Commission determined, based on ample extrinsic evidence, that the campaign was fully underway and therefore that it no longer was reasonable

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senatorial elections * * *." ABC Br. 37 n.49. By establishing standards to govern negotiations between candidates and broadcasters, the Commission has reduced the likelihood that it will be involved in case-by-case adjudication of complaints.

[37] The networks repeatedly characterize the Commission's decision as somehow triggering the campaign (NBC Br. 19; CBS Br. 36-37; ABC Br. 14, 17, 37-39, 43). As the court below pointed out, however, the Commission did not set a starting date for the campaign; it found from an abundance of objective evidence that it was already in full swing: "the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process" (Pet. App. 27a).

[38] The Commission is experienced in assessing the level of campaign activity, since that is essential in applying some of its own longstanding rules. See 47 C.F.R. 73.1940(a)(5), (f). CBS compares (Br. 35 n.83) this determination to determinations involved in applying the "fairness doctrine." However, application of the "fairness doctrine" requires review of program materials to ascertain if controversial issues have been presented and if opposing viewpoints have been expressed. In contrast, determining the commencement of a campaign requires only a consideration of extrinsic evidence relating to the existence of campaign activities in the relevant geographical area.

to completely foreclose candidates from access to the airwaves.[39]

3. The networks also contend that the Commission has acted arbitrarily by requiring them to consider candidate requests on an individual basis once the campaign commences (NBC Br. 21-27; CBS Br. 37-40; ABC Br. 39-41). However, there is nothing irrational about construing a statute which focuses on specific candidate requests for "use" of broadcast facilities as requiring individualized treatment. This does not compel the broadcaster to render a value judgment about the particular request, to second-guess the candidate or his media strategy, or to speculate about the ultimate utility of the requested time to the campaign. The Commission requires a good faith consideration of the individual request solely to assure that the broadcaster actually takes into account the stated requirements of the candidate and attempts to accommodate the request to the extent feasible. "[C]onsideration of the candidate's needs should manifest itself in a 'specific—rather than blanket—response to the individual request [which affords] greater assurance * * * that the candidate's interests cannot be ignored in the balancing process' "

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[39] As the Commission recognized in its *1978 Report and Order, supra*, 68 F.C.C.2d at 1091, "each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates." Thus, while some campaigns "may be limited to a short concentrated period," a "presidential campaign may be in full swing almost a year before an election." The Carter-Mondale Committee requested broadcast time approximately eleven months before the general election and eight months before the Democratic convention.

(Pet. App. 36a).[40] After all, candidates are the immediate beneficiaries of the statute, and they are granted reasonable "use" of broadcast facilities to advocate their own "candidacy." The Commission did not abuse its authority by determining that specific requests from candidates should be accommodated to the extent practicable, since any other approach would permit their individual campaign strategies simply to be "ignored."

The networks also argue (ABC Br. 15, 37, 39; CBS Br. 5, 6-7, 12, 21, 40; NBC Br. 23-25) that attention to individual needs prevents them from adopting an "evenhanded" or "uniform" policy in dealing with candidate requests. The networks are correct in asserting that they may not adopt a blanket policy of this kind.[41] It is not the purpose of Section

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[40] NBC argues (Br. 22-23) that consideration of candidate requests on an individual basis is "meaningless" unless the broadcaster is allowed to itself "assess or weigh each candidate's needs." There is no merit to this assertion. Under the Commission's analysis, the candidate's stated needs are not to be second-guessed, but rather are to be taken account of along with the broadcaster's own valid concerns—multiplicity of requests and program disruption. The Commission's approach thus precludes the adoption of blanket policies that permit a broadcaster to overlook the particular request made by the candidate.

[41] Broadcasters may, however, attempt to arrive at an overall policy in this area through agreement with candidates. The Commission repeatedly has urged broadcasters to contact candidates and attempt to arrive at such an accommodation. See *Use of Broadcast and Cablecast Facilities By Candidates for Public Office, supra,* 34 F.C.C.2d at 536: "One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations." In this case, the Commission stated: "we believe that good faith

312(a)(7) to limit candidates to uniform time rations dispensed mechanically by broadcasters. Indeed, since candidates often have differing needs and strategies for reaching the public and articulating their views, a blanket policy may intentionally or unintentionally favor one candidate versus another. The risk of such favoritism is reduced by the guarantee of reasonable access to the individual candidate. Other statutory provisions are aimed at equality of a carefully prescribed kind. Congress enacted Section 315 of the Act to permit an opposing candidate to respond to any initial political use of the airwaves, if a request for equal time is promptly made. The contingent equal opportunities requirement thus has a complementary role to play, but it does not supersede the affirmative "reasonable access" requirement of Section 312(a)(7) (Pet. App. 68a n.22).

In this connection, it is important to distinguish the operation of the equal opportunities provision, as enacted by Congress, and the uniform treatment concept proposed by the networks. Section 315 of the Act does not apply to any initial grant of access. It merely provides that, if access is granted, rival candidates may, if they choose, purchase an equivalent amount of time. This benefits the rival candidate without curtailing the right of the original candidate to present his views. The networks in this case, by contrast, propose a different scheme. They claim the right to determine in advance and on a unilateral basis how much time to afford all candidates for federal office and when to offer such time. They assert the right to adopt a blanket policy limiting, for ex-

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negotiations are to be preferred and urge that course" (Pet. App. 101a n.34)—a course that the networks refused to follow.

ample, all candidates to five minutes of air time at a particular stage of the campaign, even though one candidate may desire a half hour segment and his rival may desire several five minute segments. Thus, they would arrogate to themselves authority to determine how much broadcast exposure each candidate may have, regardless of his or her particular media strategy. It was not irrational for the Commission to reject that view of Section 312(a)(7).

The networks also misleadingly suggest that the only dispute in this case concerns whether the individual candidate should have the right to insist on a half-hour in December rather than January—and express bewilderment that they could be found to have behaved unreasonably by merely offering an alternative time slot (ABC Br. 6 n.11, 21 n.23, 41; NBC Br. 29 n. *; CBS Br. 4 n.9). These arguments are conspicuously devoid of any reference to the record. In fact, ABC stated before the Commission only that it would begin to sell some time (although it did not say in what amount or in what part of the day) on some undisclosed date in January (J.A. 41, 58). NBC merely represented that it would begin selling time at some unspecified date in the future (J.A. 42, 60 n. *). As previously noted, the preconceived policy of CBS allowed only one five minute time segment in prime time. Thus, the Commission was not faced with a record in which the networks had made specific, responsive counter-offers.[42] If such counter-offers had been

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[42] Compare *WALB, TV, Inc.*, 59 F.C.C.2d 1246, 1248 (1976) (broadcaster's refusal to grant request for five-hour block of time to presidential candidate was not unreasonable when counter offer of one-half hour was made); *Frank Church*, 37 Rad. Reg. 2d (P&F) 337 (1976) (broadcaster refusal to grant request for one-half hour of time to presidential candidate was unreasonable when counter-offer of only

made, the Commission's decision may well have been different. Indeed, the complaint may never have been filed.

4. The Commission emphasized in its orders in this case that the factors to be considered in evaluating Section 312(a)(7) requests—*e.g.*, likely multiplicity of claims for reply time and significant program disruption—are factors bearing on the broadcaster's needs and interests. The only countervailing factor that the Commission required broadcasters to consider in the balance was the candidate's stated requirements. The networks nonetheless contend in this Court that the Commission has "eviscerated" broadcaster discretion and precluded a fair evaluation of their legitimate needs (ABC Br. 14; NBC Br. 29-30 n.*; CBS Br. 38). In making this assertion, the networks simply ignore the fact that they never have offered *any* good reason for rejecting the request of the Committee.

The networks wholly failed to demonstrate any reasonable prospect of a large number of requests for equal time if they honored the request made by the Committee.[43] On the record in this case, the Commis-

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five minutes was made). No request for time need be honored under Section 312(a)(7), of course, unless the candidate is willing to pay for that time. See *Kennedy for President Committee* v. *FCC*, No. 80-1549 (D.C. Cir. Aug. 6, 1980), slip op. 36.

[43] There were approximately a dozen major candidates at the relevant time who *might* have made requests for equal time (Pet. App. 92a). However, only candidates for the *Democratic* nomination, who were legally qualified under the Commission's rules, and who requested time within seven days, would be entitled to "equal opportunities" under Section 315(a). See 47 C.F.R. 73.1940(a), (e), (f); *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d

sion reasonably concluded that the networks' claims of multiple requests for equal time were "speculative and unsubstantiated at best" (Pet. App. 138a).

Likewise, no issue of "program disruption" ever arose on this record.[44] No colorable claim of disruption could be predicated on the sale of a single half-hour to a political candidate, requested two months in advance. This is particularly true where, as here, the candidate specified no particular slot within the prime time range and selected four alternative days.[45]

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at 2218. Moreover, economic realities also stood in the way of any significant number of such requests in December 1979, either under Section 315(a) or 312(a)(7). The cost of a half hour of prime time was then as much as $186,000, and President Carter alone had qualified for federal matching funds (J.A. 171, 209 n.*). Further, the networks never claimed to have contacted any rival candidates to determine their likely responses (Pet. App. 126a, 138a). Finally, subsequent events confirmed the reasonableness of the Commission's finding that there was no realistic danger of an outpouring of such requests. President Carter ultimately succeeded in purchasing five minutes of time from CBS in December and thirty minutes of time from ABC in January (Pet. App. 11a). There is no indication that either network received *even a single request for equal time,* much less a large number of such requests, following those broadcasts.

[44] The Commission has recognized that undue program disruption would occur, for example, if multiple requests for equal time in the closing days of a campaign resulted in political programming "to the exclusion of all or most other types of programming." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office, supra,* 34 F.C.C. 2d at 536. The Commission has thus acknowledged that Congress did not intend "that all or most time be preempted for political broadcasts." *Ibid.*

[45] Each network had 44 half hours of prime time programming per week, for a three network monthly total of 528 half hours. The Carter-Mondale Committee sought to purchase

And, as previously noted, the record in this case did not support a claim that requests for equal time were likely to be tendered in any significant number.

In short, the Commission was prepared in this case to listen to any reasonable explanation offered by the networks for their refusal to provide time. That explanation was never forthcoming. In this context, the networks should not be heard to complain that their discretionary judgment was not heeded. At bottom, the networks argue in this case that *any* asserted justification for refusing time, clothed in the rhetoric of "broadcaster discretion," must be accepted by the candidate and the Commission, regardless of its factual basis. Such a view would nullify the reasonable access obligation prescribed by Congress in Section 312(a)(7).[46]

III. SECTION 312(a)(7), AS IMPLEMENTED BY THE COMMISSION, MAKES A SIGNIFICANT CONTRIBUTION TO FREEDOM OF EXPRESSION ON ISSUES OF VITAL IMPORTANCE AND DOES NOT IMPERMISSIBLY INTERFERE WITH BROADCASTERS' FIRST AMENDMENT RIGHTS

All of the networks base their final challenge to Section 312(a)(7), as interpreted by the Commission

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only one of those half hours. Networks, of course, frequently alter their scheduled programming to serve their own commercial interests. See B. Cole, *Television Today* 6-7 (1981).

[46] The networks' exaggerated claims of "eviscerated" discretion are perhaps best answered by *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (1966) (Burger, J.): "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened with enforceable public obligations. * * * After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust * * *."

and as applied in this case, on the First Amendment (ABC Br. 43-49; CBS Br. 40-49; NBC Br. 25-33). The familiar terms of the First Amendment provide that "Congress shall make no law * * * abridging the freedom of speech, or the press * * *." Far from "abridging" freedom of speech or the press, Section 312(a)(7) "makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a; Tamm, J., concurring). Congress enacted this provision to "give increased play to ideas touching the very essence of our democracy"—a "goal that surely lies near the heart of the first amendment" (*id.* at 67a).

Section 312(a)(7) facilitates freedom of expression by candidates and permits voters to hear information of vital importance to them. Moreover, the Commission has not ignored the legitimate interests of broadcasters in effectuating these objectives. The record in this case clearly shows that the Commission has bent every effort to accommodate all of the First Amendment interests at stake. As the Commission explained (*id.* at 90a):

> [W]e recognize that our decision concerns First Amendment interests—both those of the general public in full-ranging debate on electorate informing issues and those of broadcasting journalists in preserving their editorial discretion. While the constitutionality *vel non* of Section 312(a)(7) is basically a matter for Congress and the courts, we must interpret the statute, if possible, to effectuate Congress' intent while not unnecessarily impinging on the broadcasters' journalistic discretion.

The Commission added that it was fully aware that Section 312(a)(7) "must be applied with First Amendment interests in mind" (*id.* at 90a n. 18). As we demonstrate below, the Commission has suc-

ceeded in the "delicate balancing of competing interests" called for by the First Amendment. *CBS Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 117.

A. The Statute, as Interpreted by the Commission, Facilitates Free Expression by Candidates

The court of appeals correctly highlighted the importance of the broadcast media in a democratic society, and stressed the unique utility of such media in communicating the views of candidates (Pet. App. 11a-12a). Access to program time on national television networks permits candidates to present their views on political issues in homes throughout the nation; conversely, denial of access effectively obstructs such communication.[47] Congress enacted Section 312(a)(7) precisely because candidate access to the broadcast media had been denied unreasonably in the past and a guarantee of "reasonable access" was essential to facilitate the operation of the democratic process (see pages 26-32, *supra*).[48]

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[47] The Carter-Mondale Committee stated in its affidavit filed with the Commission (J.A. 209): "There are no feasible alternatives to purchasing time for the half-hour program on one of the three respondent networks on, or as close as possible to, the date of the President's announcement as originally requested. * * * Attempting at this point to purchase comparable time on the hundreds of individual stations required to duplicate network coverage would be prohibitively expensive and logistically impractical, if not completely impossible."

[48] As Professor Emerson has observed: "There are numerous reasons for the failures now threatening the existence of the system [of freedom of expression]. Probably the most significant is the overpowering monopoly over the means of communication acquired by the mass media. * * * Three gigantic networks, ABC, CBS and NBC, determine most of what is seen in American homes on television." T. Emerson, *The*

Candidates, of course, have First Amendment rights to present their views to potential voters. As this Court observed in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 52-53:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.[49]

See also *id.* at 48. Accordingly, a statute aimed at securing "reasonable access" to the airwaves for candidates is a "congressional effort, not to abridge, restrict, or censor speech, but rather * * * to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 375, 394; *FCC* v. *National Citizens Committee for Broadcasting*, *supra*,

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System of Freedom of Expression 627-628 (1970). At the same time that it enacted Section 312(a)(7), Congress rejected proposals that the equal opportunities provision contained in Section 315 should be repealed. At that time, Congress expressed deep concern that unfettered control of the airwaves by broadcasters would stifle political communication. See 117 Cong. Rec. 43150 (1971) (remarks of Rep. Dingell); *id.* at 43168 (remarks of Rep. Harvey).

[49] The First Amendment right of candidates to advocate their election does not, in itself, include the right to demand access to television or radio. Congress enacted Section 312(a)(7), vesting candidates with a *statutory* right of access, to facilitate their First Amendment rights.

436 U.S. at 801-802; *The System of Freedom of Expression, supra,* at 629-630, 664-667.

The Commission's interpretation of Section 312 (a)(7), which requires consideration of the media plans of the individual candidate, is entirely consistent with this Court's recognition that it is essential for each candidate to "vigorously and tirelessly advocate his own election." [50] If broadcasters could simply ignore the stated requirements of a candidate, or decide unilaterally when air time should be made available for sale, the candidate's ability to communicate with the public—in a manner that is most efficient and conducive to the presentation of his own particular message—would be seriously eroded.[51]

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[50] The purposes of the First Amendment are best served by affording reasonable attention to the individual requests of candidates. If broadcasters had unilateral power to dictate formats, program lengths, and broadcast times, then broadcasters, not candidates, would decide what could be said to the public and when. This would constitute effective censorship by broadcasters of the expression of candidates. In this respect, the networks' assertion that they offer adequate coverage to candidates in newscasts is completely beside the point. The interest of a candidate in communicating his views is poorly served, if at all, when reliance must be placed on others to filter and edit the presentation. Candidates are entitled to have their views presented by " 'persons who actually believe them; who defend them in earnest, and do their very utmost for them.' " *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 392 n.18 (citation omitted).

[51] The fact that candidates with substantial economic resources may purchase more time than those who do not is not an argument against affording individualized treatment. The expenditure of funds to promote one's candidacy is itself an aspect of protected free speech. See *Buckley* v. *Valeo, supra,* 424 U.S. at 39, 54, 57. Moreover, flexibility in purchasing time on broadcast stations may be essential to a candidate of limited means who wishes to mount an early, effective media

B. The Statute, as Interpreted by the Commission, Facilitates the Right of Voters to Receive Information About Political Candidates

The right of the public to receive information about political candidates is correlative to the right of candidates to advocate their views. In the hierarchy of First Amendment rights, the right of the public to receive this information—and to participate in the process of self-government on an informed basis—is supreme. Regardless of the party affiliation of a particular candidate, the public requires information about the candidate to cast the ballot in an intelligent manner. That information is of utmost importance to the public because it is an essential ingredient in the effective functioning of representative government.

The Commission's enforcement of the "reasonable access" provision in cases such as this facilitates the public's right to receive essential political information.[52] As this Court has observed, "[i]t is the right of the public to receive suitable access to * * * political * * * ideas and experiences which is crucial here." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. Stated otherwise, "[i]t is the right of the

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campaign in order to acquire additional financial support. Flexible access to the media may be essential in establishing name recognition for the newcomer, just as it is for an incumbent wishing to pursue his own individual media strategy.

[52] Contrary to the networks' suggestion (CBS Br. 35, 45; NBC Br. 48-49), Section 312(a)(7) does not merely facilitate the free speech of candidates. It also serves to "more fully and completely inform the voters." See S. Rep. No. 92-96, *supra* at 20, 23. The Commission has consistently construed the statute with that understanding. See *1978 Report and Order*, *supra*, 68 F.C.C.2d at 1087-1089; *Licensee Responsibility under Amendments to the Communications Act made by the Federal Election Campaign Act of 1971*, *supra*, 47 F.C.C.2d at 517; Pet. App. 90a, 123a, 134a.

viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid. See also CBS, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 122 ("it must constantly be kept in mind that the interest of the public is our foremost concern"). See also *Buckley* v. *Valeo, supra,* 424 U.S. at 14-15, emphasizing that the First Amendment has " 'its fullest and most urgent application' " in protecting the public's right to information about political candidates, since, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."

The statute, on its face, makes a significant contribution to this objective. It assures that candidates have reasonable access to the airwaves to reach the electorate. And, as interpreted by the Commission, it is effective in doing its job. The Commission has interpreted it to apply precisely when the public needs information most—when the campaign is fully underway. Moreover, the Commission has interpreted it to require attention to the media strategy of individual candidates so that those candidates may, with the help of their advisers, chart the course that is best adapted to reaching the intended audience.

In short, if the Commission and the courts were to accept the position of the networks here—two of which denied the candidate any time and one of which offered only five minutes to summarize a three year term in office—that decision not only would fail to give effect to the statute but also would disregard the constitutional precept that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776-777 (1978).

C. The Statute, as Interpreted by the Commission, Does Not Unduly Restrict the Discretion of Broadcasters

Despite its manifest contribution to the cause of political free speech, the networks nonetheless contend that Section 312(a)(7), as construed by the Commission, impairs their discretion to such a degree that it cannot survive constitutional scrutiny. In response to that assertion, several preliminary observations are in order. The statute does not preclude broadcasters from presenting their views on any issue or from carrying entertainment or public affairs programming. It calls for no governmental surveillance of the contents of their broadcasts, and has no impact on their news and editorial presentations. Finally, it does not require broadcasters to evaluate the contents of political programming proposed by candidates, and it does not require them to choose among or discriminate against candidates. The statute simply requires broadcasters to afford candidates for federal office reasonable access to the airwaves, and to adhere to standards prescribed by the Commission in considering individual requests. Thus, as in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to [47 U.S.C.] § 326; or of the official government view dominating public broadcasting.

At bottom, then, the networks' First Amendment arguments in this case resolve into the assertion that

affording reasonable access is an improper impairment of their discretion to broadcast what they please, and that the Commission's standards cannot be enforced without undue intrusion into their affairs.

1. The argument that broadcasters have a First Amendment right to resist Congress' allocation of air time for political "uses" is completely without merit. As this Court held in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 389:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which * * * otherwise, by necessity, [would] be barred from the airwaves.

The Court added that "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390.[53] Thus, due to the overriding public interest in the use of limited broadcast frequencies, this Court's decisions consistently have recognized that "of

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[53] In upholding the Commission's "fairness doctrine" in *Red Lion*, the Court observed that "[r]ather than confer frequency monopolies on a relatively small number of licensees * * * the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time [to persons seeking to offer a rebuttal]." 395 U.S. at 390-391.

all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-802 (1978) ("efforts to 'enhanc[e] the volume and quality of coverage' of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be"); *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 94, 101-103; *NBC* v. *United States*, 319 U.S. 190, 226-227 (1943). These precedents clearly confirm Congress' authority to "re-allocat[e] the 'use' of portions of the airwaves from the licensee to the candidate" (Pet. App. 47a)—as it has done under Section 312(a)(7).[54]

This Court's decision in *CBS, Inc.* v. *Democratic National Committee*, *supra*, confirms the correctness of the decision of the court of appeals in this case. In

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[54] CBS argues (Br. 43) that once Congress vests broadcasters with discretion in conducting their affairs, it may not thereafter interfere with the freedom that it has conferred. However, following the enactment of Section 312(a)(7) in 1972, no broadcaster could have expected to exercise "editorial discretion" to deny a federal candidate's request for reasonable access. As this Court recognized in *Red Lion*, moreover, it is proper for Congress to reallocate "use" of the broadcast spectrum to accommodate the needs of political candidates. Congress has long regulated the limited broadcast spectrum by dividing its use between private broadcasters and political candidates, and has divested broadcasters of "editorial discretion" over the presentations of political candidates. See *Farmers Union* v. *WDAY*, *supra*, 360 U.S. at 529. In short, with respect to airtime that Congress has reallocated for political use, broadcasters possess no editorial discretion.

that case, this Court reversed a decision of the court of appeals which had compelled the Commission to adopt regulations requiring broadcasters to make time available to the general public. The Court found no statutory authority, or authority in Commission precedent, for such a requirement. Here, by contrast, *Congress* has prescribed the right of access for federal candidates and the Commission has implemented it. In these circumstances, the teaching of *Democratic National Committee* is plain: "[I]n evaluating the First Amendment claims of [the litigants], we must afford great weight to the decisions of Congress and the experience of the Commission. * * * The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." 412 U.S. at 102-103. More specifically, as the Court recognized in *Democratic National Committee*, it is permissible for Congress to devise a "limited right of access that is both practicable and desirable" (*id.* at 131).[55]

2. Broadcasters do, of course, receive certain protections from the First Amendment. The broadcasting industry is entitled to exercise "the widest journalistic freedom *consistent with its public obligations.*" *CBS, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 110 (emphasis supplied). In this

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[55] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 709 (1979), has no bearing on the question presented here. The Court held in that case that "authority to compel cable operators to provide common carriage of public originated transmissions must come specifically from Congress." The Court expressed no views on the First Amendment in that case. *Id.* at 709 n.19. Here, by contrast, Congress *has* granted a specific right of reasonable access to political candidates and has given the Commission power to effectuate that right.

case, the statute, as implemented by the Commission, affords broadcasters the widest measure of discretion that is consistent with the essential First Amendment interests of political candidates and the voting public. Section 312(a)(7) imposes obligations only with respect to a narrow and precisely defined group—legally qualified candidates for federal office.[56] Moreover, the access right is limited to a specific "use," that is, advocacy of candidacy for office. Thus, complexities of the kind associated with the general public access scheme considered in *CBS, Inc.* v. *Democratic National Committee* are largely avoided. Congress has specified who is entitled to invoke the statute (candidates for federal elective office) and for what purpose (to advocate their candidacies). And it also has identified, under Section 315(a) of the Act, those who are entitled to "equal opportunities" for reply.[57] Under this statutory scheme, moreover, broadcasters need not (indeed, may not) evaluate or edit the programming that candidates seek to present to the public. In short, the statute imposes narrowly drawn obligations on broadcasters and is largely self-executing, particularly as construed by the Commission.

The Commission's interpretation of Section 312(a)(7) provides guidance for broadcasters seeking to

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[56] The Commission has adopted specific standards for defining who is a "legally qualified candidate" entitled to invoke Sections 312(a)(7) and 315 of the Act. See 47 C.F.R. 73.1940(a), (f).

[57] Equal opportunities under Section 315 of the Act are available according to straightforward legal standards. If a broadcaster grants access under Section 312(a)(7), equal opportunities must be afforded to rivals who so request within seven days. See *New Primer on Political Broadcasting and Cablecasting, supra*, 69 F.C.C.2d at 2215-2224.

negotiate with candidates without Commission intervention and minimizes the burdens imposed by the statute. Under the Commission's interpretation, the statute does not apply until the campaign is fully underway, as established by objective evidence described in the Commission's opinion (Pet. App. 92a-94a). Furthermore, the Commission has guided broadcasters on how they should treat individual requests once the campaign commences. They must attempt to accommodate the particular request of the candidate to the extent practicable, weighing in the balance the countervailing factors of program disruption and multiple requests for equal opportunities. If they do this reasonably and in good faith, the Commission will not reverse their determination (Pet. App. 86a-87a & n.16).[58] Thus, by fashioning standards under the congressionally prescribed rule of reason, and applying those standards with deference to the broadcaster's discretion, the Commission has successfully walked the "tightrope" and balanced the competing First Amendment interests of candidates, voters, and broadcasters. *CBS, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 117.[59]

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[58] As the court of appeals pointed out (Pet. App. 46a), the Commission's review function is limited to two essential inquiries: 1) did the broadcaster consider the relevant factors? and 2) did the broadcaster reasonably explain the basis for its decision in terms of those factors?

[59] The Commission's standards, of course, cannot be applied with the simplicity of a mathematical formula. The "rule of reason" prescribed by Congress requires attention to the facts of each particular case. This, however, does not invalidate the Commission's approach. See *Red Lion Broadcasting Co.* v. *FCC, supra*, 395 U.S. at 395: "The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to

3. Nothing on the record in this case suggests that the reasonable discretion of broadcasters has been ignored. The Commission has not second-guessed any good faith effort on the part of the networks to accommodate the needs of an individual candidate, and the Commission has not rejected any factually-supported claim of business necessity. Nor has it imposed any obligation that would disrupt entertainment programming. Indeed, the Commission has not imposed sanctions of any kind on any broadcaster. It simply ordered the networks to state how they would comply with the statute. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396 (the Commission "will not impose sanctions in such cases without warning"). Finally, there is no evidence on this record of a continuing, day to day surveillance of networks in their dealing with candidates. To the contrary, the Commission has announced standards with the expectation that those standards will be largely self-executing, through the good faith efforts of broadcasters and candidates alike, and that questions of reasonable access ordinarily will be resolved through negotiation.[60]

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discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply."

[60] In cases of stalemate, the candidate may complain to the Commission or the network may seek a declaratory ruling.

In this context, it is unnecessary to speculate about abuses of the statute that might occur if it were administered in bad faith or with disregard for the interests of all concerned. It is enough here to note that the Commission has made a painstaking effort to balance the rights of broadcasters, candidates, and the voting public, and that there is no reason to presume that it will follow any different course in the future. As the Court observed in *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 743: "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" For this reason, the constitutionality of Section 312(a)(7), as interpreted by the Commission, should not be tested "by envisioning the most extreme applications conceivable." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 396. If abuses should occur in the future, reviewing courts may "deal with those prob-

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See 47 C.F.R. 1.2. The possibility of Commission intervention, however, should have no relevant "chilling effect." The potential intervention of the agency may cause broadcasters to listen with greater seriousness to individual requests from candidates, but that is precisely the effect that Congress sought to achieve. And, in those circumstances, the potential involvement of the agency would enlarge, not contract, freedom of speech. Moreover, there is no reason to expect that this kind of oversight will have a "chilling effect" on commerical programming. This Court has observed, with respect to profitable commercial speech in general, that "there is little likelihood of its being chilled by proper regulation and foregone entirely." *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 772 n.24 (1976). See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 392-393; *FCC* v. *Pacifica Foundation*, *supra*, 438 U.S. at 742-743.

lems, if and when they arise." *Ibid;* see also Pet. App. 47a n.117, 62a-68a.[61]

In sum, Section 312(a)(7), as construed by the Commission, guarantees to candidates and voters the opportunity to exchange information essential to the exercise of the fundamental right to vote. The legitimate interests of candidates and voters must be weighed in the balance along with the commercial concerns of broadcasters. The Commission's interpretation assures that intrusion on the discretion of broadcasters is reduced to the minimum level that is consistent with the public necessity. Under these circumstances, it is appropriate to afford "weight to the decisions of Congress and the experience of the Commission" (*CBS, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 102), and to reject the constitutional arguments advanced by the networks.

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[61] It is noteworthy that, in the present case, the networks obtained a stay from the court of appeals which relieved them of any duty to comply with the Commission's order while they litigated the propriety of that order (without success) in the court of appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

ROBERT R. BRUCE
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

C. GREY PASH, JR.
LISA B. MARGOLIS
Attorneys
Federal Communications Commission

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Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC. AND NATIONAL BROADCASTING COMPANY, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
AMERICAN BROADCASTING COMPANIES, INC.
1330 Avenue of the Americas
New York, NY 10019

February 24, 1981

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER AMERICAN BROADCASTING COMPANIES, INC.

The Brief for Respondents fails to address meaningfully many of the central issues of this case. By premising their argument on the theory that Section 312(a)(7) creates a "new obligation" that "vests rights in individual candidates,"[1] Respondents disregard critical limitations built explicitly and implicitly into the statute. By

[1] Brief for Respondents (hereinafter "FCC Brief"), p. 14.

contending that Section 312(a)(7) represents a sharp departure in the relationship of candidates and broadcasters, Respondents overlook the fact that the decision below first erected the standards that now seriously threaten basic policies and reasoned decisionmaking. By claiming that the Commission's interpretation of Section 312(a)(7) benefits political expression, Respondents divert attention from the Commission's potentially wholesale intrusion into the partisan political process.

I. RESPONDENTS HAVE NOT DEMONSTRATED THAT SECTION 312(a)(7) AUTHORIZES THE RIGID REGULATORY SYSTEM ESTABLISHED BY THE DECISION BELOW

Respondents attempt to cast the decision below as being virtually compelled by the explicit language of Section 312(a)(7) and representing a natural outgrowth of preexisting legislative and regulatory policies. An examination of the pertinent language and the overall policy framework does not support this assessment. Rather, it shows a Congressional intention and a regulatory tradition that, while encouraging political discussion, nevertheless recognizes long-established concepts of reasonableness, licensee discretion, and evenhanded treatment of political candidates—principles that represent the very antithesis of a "vested" individualized right of candidate access.

A. The Plain Language Of Section 312(a)(7) Undermines, Rather Than Supports, The Decision Below

In the introduction to their brief, Respondents note that " 'the starting point in every case involving construction of a statute is the language itself,' " repeating this Court's admonition in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979). We agree, as our opening brief clearly indicates. ABC Brief, pp. 20-23.

We emphatically disagree, however, with the extended meaning Respondents now attempt to ascribe to that language.[2]

On its face, Section 312(a)(7) speaks in rather general and abbreviated terms, merely providing that the Commission may "revoke any station license" for:

> "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."[3]

Contrary to Respondents' emphasis on the Commission's authority to penalize broadcasters for failing to afford access in a highly individualized manner, the provision incorporates an unmistakable discretionary element—i.e., a standard of reasonableness. Indeed, the provision employs the concept reasonableness not once, but twice—referring both to "reasonable access" and to "reasonable amounts of time." If Congress had intended to depart from the long-established concept of permitting deference to reasonable broadcaster judgments, it surely would have chosen words less qualified and more specific. The new, highly individualized access right for federal candidates claimed by Respondents is simply not found in the statutory language.[4]

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[2] It is revealing—perhaps ironic—that while Respondents presently speak so convincingly of the plain and graphic nature of Section 312(a)(7)'s meaning (FCC Brief, pp. 19-23), at earlier stages and in other, less defensive circumstances, the Commission saw fit to conclude that the language of the statute and its legislative history did not provide very significant guidance. *See, e.g., Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1087 (1978).

[3] 47 U.S.C. § 312(a)(7).

[4] Similarly, Respondents fail to demonstrate that the phrase "*his* candidacy" is somehow axiomatic of a new individualized right. FCC Brief, p. 20. As we noted in our opening brief (ABC Brief,

As this Court has indicated, prior to the passage of Section 312(a)(7), Commission interpretive policy required broadcasters to make some time available to political candidates generally. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14 n.12; ABC Brief, pp. 21-22. In fact, this policy was what Congress "essentially codified" in Section 312(a)(7). *Id.* Thus, it is fair to conclude that Congress, by adding a specific penalty, was confirming that Federal candidates would be able to invoke Commission processes in support of their requests for time, and that a broadcaster's failure to provide Federal candidates any time at all would be plainly *un*reasonable.[5] At the same

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pp. 22-23), other political broadcasting provisions, applicable to all candidates, are either implemented or asserted in an "individualized" sense by candidates acting on behalf of *their* candidacies. *See, e.g., Citizens for Reagan*, 58 F.C.C.2d 925 (1976); *Rockefeller for Governor Campaign*, 59 F.C.C.2d 649 (B'cast Bur. 1976); *Lew Breyer*, 31 F.C.C.2d (B'cast Bur. 1968). Thus, a candidate exercising "equal opportunities" rights under Section 315(a) obviously is acting on behalf of his candidacy. It could be no other way. Similarly, Section 315(b), which defines certain broadcasting media rate limitations, speaks in terms of such rate provisions being applicable to *any* legally qualified candidate's campaign for *any* public office "in connection with *his* campaign for nomination for election, or election, to such office. . . ." 47 U.S.C. § 315(b) (emphasis added). Again, if Congress had intended to create a new, highly individualized right for federal candidates in Section 312(a)(7), it could easily have found words that were more specific and less general than "reasonable access" in connection with "his candidacy."

[5] As we noted in our opening brief (ABC Brief, p. 21 n.23), the conventional "willful or repeated" language of Section 312(a)(7) not only emphasizes the penalty aspect of the provision, but provides a further indication that Congress intended to place a broadcaster's license in jeopardy only if the denial of access was *complete*—i.e., "repeated" and consistent throughout a given campaign—not to provide an actionable remedy based on differences of days, weeks, or, as here, a single month, in a campaign that extends over many months (or longer).

time, by purposely incorporating a standard of reasonableness,[6] Congress sought to dispel any notion that Federal candidates were to be given a new right to command particular broadcast times or program segments based on their own individual campaign needs.

In sum, Respondents' interpretation of the statutory language unduly diminishes the conspicuous and repeated use of the term "reasonable." Fairly read, the statutory language confirms a right of reasonable broadcast access that specifically extends to all Federal candidates. Rather than introducing a radically different regulatory regime, Section 312(a)(7) essentially codifies and confirms prior agency practice premised upon a standard of reasonableness—a standard mirrored in other fundamental policies of the Act.[7]

B. The Dramatic New Standards Announced By The Commission For Implementing Section 312(a)(7) Also Conflict With Fundamental Principles Found Elsewhere In The Communications Act and Reflected In Long-Established Regulatory Policy

Essentially ignoring the foregoing literal terms of the statute, the Commission and court below have imposed new regulatory requirements that drastically alter basic precepts of the Communications Act and longstanding administrative practice. Respondents' efforts to portray these new requirements or standards as consistent with otherwise acknowledged principles of licensee discretion ultimately dissolve into a string of inconsistencies.

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[6] In an early response to this clear statutory standard, the Commission emphasized that in administering Section 312(a)(7) it would "apply the *same test of reasonableness* of the judgment of the licensee." *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972) (emphasis added).

[7] See ABC Brief, pp. 30-32.

For example, Respondents first claim that "[b]roadcasters enjoy complete discretion to withhold air time prior to the commencement of a campaign" (FCC Brief, p. 43), but then state that "once a campaign has commenced" broadcasters must "consider each request on an individualized basis." *Id.* In other words, "blanket" policies are permissible before the government declares the campaign to be in "full swing," but not thereafter. Support for this distinction, however, is conspicuously absent. One must merely presume that (1) a government decision on when the campaign commences for purposes of political time sales is more reasonable than a like determination by broadcasters and (2) the precise status of the campaign is somehow decisive on the question of when Section 312(a)(7) obligations attach. Both presumptions are patently unconvincing and unacceptable. Certainly nothing in the record of this case supports the view that the government is more expert or more impartial in judging when a campaign has commenced for Section 312(a)(7) purposes; and, despite repeated declarations that it is so, neither the language of the Act nor any pertinent legislative history even hints that Section 312(a)(7) obligations must begin upon some independent *ad hoc* determination of when a campaign begins.[8]

In a further inconsistency, Respondents have repeatedly chosen to characterize as, and draw pejorative implications from, "blanket" or "across-the-board" policies, which are no more than efforts of broadcasters to fashion seemingly reasonable and evenhanded approaches to candidate requests for air time. Thus, under their formula-

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[8] Indeed, in the only situation that bears any relevance—i.e., the contemporaneously enacted restriction on political rates to minimize the cost and, we submit, the length of broadcast campaigning—Congress chose to establish arbitrarily separate and clearly defined 60-day (for general elections) and 45-day (for primary elections) periods of time. See 47 U.S.C. § 315(b).

tion, any broadcaster determination to commence the sale of political time with a view toward evenhanded treatment of *all* candidates would be totally impermissible.[9] Rather, the *only* type of broadcaster determination possessing any prospect of being considered reasonable under the decision below would be one specifically tailored to the expressed campaign objectives of individual candidates.

If licensee discretion and the concept of reasonableness mean anything, they must permit the sort of four week difference from President Carter's demand of early December 1979 and ABC's offer, and subsequent sale, of early January 1980. Yet, under the reasoning advanced by Respondents, a failure to afford time even on a particular day—if that day had been requested by an individual candidate and urged as essential to his campaign tactics—could be construed as a "blanket" policy against sales on that day. In the end, therefore, Respondents' persistent characterization of ABC's determination to begin political sales in January 1980 rather than December 1979 as a "preconceived" blanket policy (FCC Brief, p. 44) is nothing more than a barely camouflaged denunciation of licensee discretion.

In a separate defense of the decision below, Respondents also suggest that the Commission's decision "narrows" the coverage of Section 312(a)(7) by "minimiz-

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[9] If there were any doubt on this question, the Respondents' brief is completely dispositive—declaring rather emphatically that any "uniform" or "evenhanded" broadcaster policy towards all candidates for the same office would be flatly inconsistent with Section 312(a)(7). FCC Brief, pp. 50-51. Unquestionably, this position differs sharply from previous Commission policy long considered appropriate under the public interest standard. *See, e.g., Humphrey for President Campaign*, 34 F.C.C.2d 471 (1972); *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782 (1971). It also conflicts with a fundamental policy, long part of Section 315 of the Communications Act, that *requires* equal treatment among candidates.

ing the necessity for governmental intervention." FCC Brief, p. 47 (footnote omitted). On the contrary, by arrogating to itself the exclusive power to decide when the sale of time to candidates should begin, the Commission has not only developed a "standard" that is inconsistent with basic policies of Act, but one that thrusts the agency into the highly unique position of either favoring or disfavoring candidates who may be especially affected by determinations of when the broadcast campaign begins.

Finally, the suggestion that such standards are "largely self-executing" (FCC Brief, p. 68) is simply specious. In the present era of extended, nearly perpetual Presidential campaigns, certainly different assessments of when the campaign has "commenced" or is in "full swing" are possible—if not inevitable. Yet, under the standards adopted in this case, the only determination that counts is the government's own "objective" assessment.

Similarly, what is self-executing about ultimate judgments that make the difference between reasonable and unreasonable depend upon only a few weeks in campaigns that extend beyond a year? Suggestions first advanced by the court below (629 F.2d at 20, Pet. App. 37a), and more recent assurances by the Respondents (FCC Brief, p. 43), that broadcaster counter-offers of time will minimize government intrusiveness and add exactness, are belied by the realities of this case. Thus, while CBS "counter-offered" with smaller segments of programming and ABC "counter-offered" with a period during the first week of January (instead of the first week of December), the "dispute" was resolved by the government's declaration that such offers constituted unreasonable "blanket" policies.

The suggestion that the Commission's interpretation of Section 312(a)(7) can be administered in a mechanical

fashion is, therefore, ludicrous. Instead of being self-executing, as Respondents claim, the standards almost encourage candidates seeking media advantages in the guise of individualized treatment to turn to the Commission for *ad hoc* rulings on whether the campaign has commenced, whether individual candidate needs have been properly assessed, and whether any "counter-offer" by the broadcaster was sufficiently responsive.

While Respondents strive mightily to find a dramatically new, additional obligation arising out of Section 312 (a) (7), they never satisfactorily address the problems created by the new standards that purport to implement the claimed obligation. As we have shown, and wholly apart from what conclusions are reached about the literal language of the statute and its legislative history, in practical effect, the decision below poses a grave threat to reasoned decisionmaking. Instead of determining political access on the basis of overall reasonableness, as called for by the statutory language and the broad history that surrounds this provision and the political broadcasting and related provisions of the Act, the Commission has devised implementing standards that can only breed confusion and arbitrariness—a conclusion that is merely confirmed anew by the Respondents' brief.[10]

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[10] In this connection, we believe the Court should be advised that on December 11, 1980—more than a year after the complaint in this case but only a month following the general election—the Assistant Secretary for Communications and Information of the Department of Commerce, acting for the National Telecommunications and Information Administration (NTIA), filed a petition with the FCC requesting the initiation of a notice of inquiry to consider an approach to implementing Section 312(a) (7) that would differ dramatically from the approach and interpretation formulated by the Commission in this case. In essence, the approach now recommended by NTIA calls for the Commission to abandon complaint-by-complaint determinations under Section 312(a) (7) and, instead, to examine the question of compliance with Section 312(a) (7) "only upon an overall basis, either at renewal or revocation." NTIA "Petition to Issue Notice of Inquiry," Dec. 11,

II. RESPONDENTS HAVE GLOSSED OVER THE POLITICALLY INTRUSIVE NATURE OF THE DECISION BELOW

As we emphasized in our main brief, one of the more disquieting aspects of the decision in this case is the threat it poses for governmental involvement in the partisan political process. Thus, under the standards crafted by the Commission and approved by the court below, not only is the Commission to make "legal" determinations concerning the commencement date of federal campaigns, with attendant political access consequences, but it is also to sit in judgment on whether broadcast stations have been sufficiently responsive to each candidate's expression of need for the time sought.

Respondents' brief attempts to gloss over the politically intrusive nature of these standards by suggesting that the ruling below enhances political discussion. In our

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1980, p. 1. Apart from the merits of this proposal, it is significant that NTIA urges this particular course, in part, *because* a case-by-case application of the standards developed in this (*Carter-Mondale*) case will thrust the Commission "deep in a quagmire" (*id.* at 10) of highly subjective decisionmaking in a particularly "sensitive political area." *Id.* at 11. Raising a number of rhetorical questions going to the Commission's ability to review licensee judgments concerning such matters as the validity of specific counter-offers in any rational manner, the NTIA petition concludes: "Since everything turns on the facts of each case—not only the varying jumble of other factors but also the candidate's assertion of need and evaluation of that first by the broadcaster which has discretion to decide otherwise and then by the Commission—the process is, we believe, a necessarily subjective one, in that the parties can only know if they have acted reasonably when the agency issues its declaration." *Id.* at 11-12 (citation omitted). In NTIA's view, although Section 312(a)(7) was designed to impose a general obligation to afford access to federal candidates, Congress still intended that broadcasters be "broadly accountable" under the provision (rather than accountable to each individual candidate demand), "so as to avoid interference with day-to-day editorial decisions." *Id.* at 4.

view, this is a diversionary argument that, at bottom, simply fails to come to grips with the major First Amendment dangers posed by the standards and approach sanctioned by the Commission's decision.

We do not question that Congress and the Commission have long sought to encourage the availability of the broadcast media to political candidates. However, this is not the issue before this Court. The issue is whether the standards the Commission has adopted in this particular case—standards that, unless overturned, will govern all future Section 312(a)(7) cases—have unduly intruded upon broadcaster discretion and into the partisan political process.

Respondents have incorrectly suggested that the position of ABC and the other network companies is that First Amendment principles were violated in this case solely because broadcasters were not given virtually total discretion. FCC Brief, pp. 62-63. That simply is not the case—as ABC's opening brief makes clear. We do not claim that broadcasters should have total discretion in this area any more than we would concede that the government should have total discretion in this area. Respondents' attempt to cast our position in that form is merely an effort to detour the Court from the more sensitive issue presented.

Permitting broadcasters to exercise discretion as to when political sales should begin in given political campaigns is not inconsistent with preexisting law. *See, e.g., Antony R. Martin-Trigona*, 66 F.C.C.2d 968, 969 (B'cast Bur.), *review denied*, 67 F.C.C.2d 33 (1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978); *Hon. Dan Walker*, 57 F.C.C.2d 799 (1975). Nor is it inconsistent with the precise language of Section 312(a)(7), which, as we have noted, actually contemplates such discretion by incorporating a standard of overall reasonableness. The con-

cept of pegging broadcast political sales to an FCC-perceived commencement of the election campaign is, in fact, solely a creation of the Commission. What the Commission has done in this case is to attempt to transform a previous editorial decision on when to begin political sales into an "objective" FCC judgment. The semantic changes do not alter the essential fact—i.e., the statute does not address this specific matter and the Commission has usurped a broadcaster editorial decision.

Remarkably, Respondents now claim that these standards affirmatively operate to minimize government intrusiveness. In fact, the government's brief represents yet another manifestation of the Commission's persistent failure to appreciate the inherently sensitive political nature of the decisionmaking process required by the standards in this case. To characterize these standards as enhancing First Amendment values, or designed to avoid governmental intrusiveness, or self-executing, serves only to confirm the Commission's lack of sensitivity on this issue. Indeed, the risks of non-neutral decisionmaking—always present when a government agency is asked to arbitrate matters affecting competing political candidates—are substantially heightened by a system, as here, that places so much emphasis on individual candidate needs and then makes the government the ultimate arbiter of the sufficiency of those needs, and the sole judge of when such needs must first be honored.

In sum, the standards adopted by the Commission and upheld by the Court of Appeals exalt individual candidate needs over broadcast discretion and effectively preclude broadcasters from responding to candidate requests in an evenhanded manner. In practice, these standards will heighten the degree of governmental surveillance in an area that demands both the appearance and the fact of neutrality.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES A. MCKENNA, JR.
THOMAS N. FROHOCK
CARL R. RAMEY
DENNIS P. CORBETT
McKENNA, WILKINSON
& KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Counsel for Petitioner American Broadcasting Companies, Inc.

Of Counsel:

EVERETT H. ERLICK
ROBERT J. KAUFMAN
AMERICAN BROADCASTING
COMPANIES, INC.
1330 Avenue of the Americas
New York, NY 10019

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Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER CBS INC.

Of Counsel:

RALPH E. GOLDBERG
HOWARD F. JAECKEL
CBS INC.
51 West 52 Street
New York, New York 10019

JOSEPH DEFRANCO
CBS INC.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

February 17, 1981

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REPLY BRIEF FOR PETITIONER CBS INC.

I. RESPONDENTS HAVE FAILED TO REFUTE CBS' SHOWING THAT CONGRESS IN ENACTING SECTION 312(a)(7) INTENDED TO CODIFY THE COMMISSION'S PREEXISTING PRACTICE UNDER THE PUBLIC INTEREST STANDARD.

1. Despite the Federal Communications Commission's conclusion in its orders under review that the language of Section 312(a)(7), 47 U.S.C. § 312(a)(7), provides little guidance to its interpretation,[1] respondents now maintain (FCC Br. 19, 23, 40) that the "plain meaning" of the section is so clear that resort to the legisiative

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[1] Appendix B to Petitions for Certiorari ("Pet. App.") at 78a, 74 F.C.C.2d 631, 637 (1979). The statement required by Rule 28.1 of the Rules of this Court appears in Brief for Petitioner CBS Inc. ("CBS Br.") at ii, n.*.

history is unnecessary and perhaps inappropriate.[2] Significantly, the brief of *amici curiae* National Citizens Committee For Broadcasting, *et al.*, while taking a view of the constitutional issues similar to that of respondents, recognizes that the meaning of the statute is "not without ambiguity." (NCCB Br. 11 n.15.)

Section 312 (a) (7) provides only that the Commission may "revoke any station license" for

> "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a) (7).

In respondents' view (FCC Br. 20), the reference to the use of broadcast facilities by "a" candidate "on behalf of his candidacy" unequivocally expresses a congressional intent to impose obligations on broadcasters wholly different from those imposed by the Commission's pre-existing policy under the public interest standard.

The question, however, is not whether individual candidates have a "right" to invoke Commission processes in order to challenge broadcaster practices they think inconsistent with statutory requirements or Commission policies. Candidates had such a "right" before Section 312 (a) (7) was enacted, and often exercised it.[3] Rather, the issue is whether Section 312(a) (7) imposes a new substantive obligation. But that provision, like the other provisions of Section 312(a) (*see* CBS Br. 27-28), does

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[2] Even if the statutory language were as "plain" as respondents contend, there is no rule of law that reference to the statutory context and legislative history is inappropriate. *E.g.*, *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

[3] *See, e.g.*, *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782, 783 (1971), *Lew Breyer*, 31 F.C.C. 2d 548 (1968); *W. Roy Smith*, 18 F.C.C. 2d 747 (Broadcast Bur. 1969); *Grover C. Doggette*, 40 F.C.C. 346 (1962); *WROX*, 40 F.C.C. 339 (1962).

not purport to impose *any* obligation.[4] It only authorizes the Commission to revoke licenses for "willful or repeated failure" to meet a standard of "reasonableness" in affording access to a candidate. Prior to the enactment of Section 312(a)(7), the Commission had applied a standard of reasonableness under the public interest standard,[5] and the language of the statute does not purport to establish a different standard of reasonableness under Section 312(a)(7).

2. As shown in our opening brief (CBS Br. 14-34), the whole background and history of Section 312(a)(7) confirms this Court's conclusion that the section "essentially codified" the Commission's prior practice under the public interest standard. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).[6] Respondents virtually ignore the strong policy of the Communications Act

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[4] The section is thus in sharp contrast to Section 315 of the Act, 47 U.S.C. § 315, which provides that a licensee "*shall* afford equal opportunities" to competing candidates if it permits the use of its station by one candidate. (Emphasis supplied.) Significantly, prior to the passage of Section 312(a)(7), Congress rejected legislative proposals that would have appended an access provision to Section 315, either in the form of a mandatory duty, *see* 116 CONG. REC. 11593 (1970), or a grant of broad rulemaking authority to the Commission. S. 956, § 302(c), 92d Cong., 1st Sess. (1971).

[5] *See Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1095 (1963).

[6] The contorted efforts of respondents (FCC Br. 37-40) and *amici* (NCCB Br. 14-15) to rewrite this Court's opinion in *CBS* v. *DNC* call for little response. There is no basis for respondents' reading of this Court's opinion as somehow *contrasting* "the special treatment afforded 'political candidates' under the Communications Act with the treatment afforded 'any private individual or group.'" (FCC Br. 39.) The Court's statement clearly was offered in support of its conclusion—which was central to the holding in *CBS* v. *DNC*—that despite frequent amendments of the Communications Act, Congress had never created individual, affirmative rights of access. *See* CBS Br. 19-20.

against affirmative access rights, and do not even discuss this Court's recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), which is central to this case.[7] In *Midwest Video*, this Court made clear that Commission regulations imposing common carrier access requirements are fundamentally inconsistent with the policies of the Communications Act, stressing "Congress' stern disapproval" of access requirements which negate "the editorial discretion otherwise enjoyed by broadcasters and cable operators alike." *Id.* at 708; *see also id.* at 702-06; *CBS* v. *DNC*, 412 U.S. at 103-14.

Respondents make the remarkable suggestion that Section 312(a)(7) is not inconsistent with these longstanding policies, because of "Congress' different treatment of general broadcasting and political broadcasting." FCC Br. 25.) They also assert that Section 312(a)(7) is nothing more than a "limited extension" of the equal opportunities requirement of Section 315(a). (FCC Br. 26.) In making this argument, respondents gloss over the critical distinction between the contingent rights of access granted by Section 315, which arise only after and in response to a broadcaster's editorial decision to allocate time to one or more candidates, and the affirmative right to compel the allocation of time that the Commission has found in Section 312(a)(7).[8] Congress was unwilling to convey any such affirmative right to candidates in Section 315, and, as this Court recognized in *Midwest Video*, *supra*, Congress withheld from the Commission power "to compel broadcasters to act as common carriers, *even with respect to a portion of their total services.*" 440 U.S. at 706 n.15 (emphasis added).

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[7] Respondents casually assert in a footnote to their constitutional argument (FCC Br. 65 n.55) that *Midwest Video* "has no bearing on the question presented here."

[8] The reply obligations upheld in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) were likewise contingent on prior broadcaster editorial decisions. *See id.* at 392; pages 15-16 *infra*.

To be sure, the Commission before the enactment of Section 312(a)(7) had adopted a policy under the public interest standard requiring broadcasters to afford some time to candidates, but that policy did not impose "common carrier" obligations. It did not delegate to individual candidates the right to demand access according to their individual needs, but instead allowed the broadcaster considerable latitude in determining when and under what circumstances political time should be sold. *See Memorandum Concerning Interpretation of Second Sentence of Section 315(a)*, 40 F.C.C. 1088, 1095 (1963).

3. As we have demonstrated (CBS Br. 14-34), the particular legislative history of Section 312(a)(7) makes clear that Congress did not intend to alter the Commission's existing standard.

a. Respondents do not dispute the existence of the Commission's prior practice, or deny that Congress was aware of it. Indeed, they concede (FCC Br. 31 & n.21) that Congress specifically discussed the Commission's prior practice when it enacted Section 312(a)(7). However, respondents erroneously contend that Section 312(a)(7) resulted from congressional demands "for increased media access for political candidates" (FCC Br. 27), implicitly urging that Congress was dissatisfied with the existing standards for paid political access under the public interest standard. As we have shown (CBS Br. 22-24), the Commission frequently informed congressional committees dealing with political broadcasting matters of its policies concerning the sale of political time, and there is no indication that Congress viewed the Commission standards as inadequate.[9]

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[9] Respondents point to only one statement, by Senator Pastore in hearings held over ten years before the consideration of Section 312(a)(7), that suggests any congressional dissatisfaction with broadcaster policies with regard to paid political broadcasting. FCC Br. 27, *citing Presidential Campaign Broadcasting Act: Hearings Before the Communications Subcomm. of the Senate Comm. on*

Moreover, in the period before the enactment of Section 312(a)(7), there were no proposals to alter the existing Commission standards concerning the sale of time at commercial rates. Respondents' citations (FCC Br. 27-28) refer only to various bills (never enacted) directed at reducing campaign costs by mandating the provision of *free* time by broadcasters to candidates[10] or the provision of time at discount rates.[11]

Interstate and Foreign Commerce, 86th Cong., 2d Sess. 59-60 (1960). Senator Pastore referred to an alleged refusal by one Texas station to sell time to any candidates. *Id.* at 59. Immediately following Senator Pastore's remarks, Chairman Ford of the Commission informed the senator that broadcasters who denied any time to political broadcasts would violate their obligations under the public interest standard. *Id.* at 60. In subsequent years, Senator Pastore expressly indicated his satisfaction with the Commission's existing policy, *see Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 100-01, 144 (1962) (*"1962 Senate Hearings"*), and recommended its codification in the Communications Act. 116 CONG. REC. 11593-94 (1970).

Respondents also suggest that Congress was concerned with "the Commission's inability to protect individual candidates" (FCC Br. 27), citing a remark by Chairman Minow in hearings before the Senate Commerce Committee. *1962 Senate Hearings, supra*, at 142. Chairman Minow's testimony reflected the Commission's concern that it could enforce its public interest policy only in license renewal proceedings and is entirely consistent with a view of the statute as only creating a new sanction (*i.e.*, revocation) for violations of existing policy. *See* page 7 *infra*.

[10] S. 3171, 86th Cong., 2d Sess. (1960); S. 1548, 90th Cong., 1st Sess. (1967).

[11] S. 2876, 91st Cong., 1st Sess. (1969). Respondents also rely (FCC Br. 28) on the one provision considered by Congress prior to 1971 that did concern the sale of political time at commercial rates, the 1970 Senate amendment to S. 3637, 91st Cong., 2d Sess. (1970), that would have required broadcasters to "make a reasonable amount of time available" to candidates for federal office. *See* 116 CONG. REC. 11593 (1970). However, respondents fail to recognize that this provision, which was clearly the antecedent of Section 312(a)(7) (*see* CBS Br. 24-25), was designed to codify the public interest standard in order "to avoid any misunderstanding as to the obligation of the licensee in making time available to candi-

b. Respondents do not discuss the legislative history which suggests that Congress sought to achieve three distinct purposes in codifying the Commission's public interest standard in Section 312(a)(7). First, Congress sought to remove any question whether the Commission's requirement that broadcasters provide some time to political candidates was barred by the provision of Section 315(a) that "[n]o obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." [12] Second, Section 312(a)(7) was intended to eliminate concern that the Commission lacked adequate authority to enforce its public interest standard,[13] by creating a remedy of license revocation for "willful or repeated" violations. Third, Congress sought to ensure that the enactment of other provisions of the Federal Election Campaign Act of 1971, particularly the lowest unit rate and media expenditure limitations, would result in "no diminution in the extent" to which broadcasters made available time to candidates. S. REP. No. 96, 92d Cong., 1st Sess. 28 (1971).

c. Respondents concede (FCC Br. 30-31) that the most relevant portion of the legislative history, the specific discussion of Section 312(a)(7) contained in the report of the Senate Commerce Committee, explicitly refers to the Commission's prior policy. There is not a shred of support in the Senate report for respondents' theory that the specific discussion of the prior policy was included in order to "distinguish" it from the new right assertedly created by Section 312(a)(7),[14] and

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dates for a Federal elective office." 116 CONG. REC. 11593 (remarks of Sen. Pastore).

[12] *See Political Broadcasts—Equal Time: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 70-82 (1963).

[13] *See 1962 Senate Hearings, supra* note 9, at 142-43 (remarks of Sens. McGee and Pastore), 152 (FCC Memorandum).

[14] Neither the Commission nor the court of appeals adopted this view. The Commission asserted that this history "adds little," Pet. App. B at 79a, 74 F.C.C.2d at 637, and the court claimed that the

that theory is plainly inconsistent with the language of the report:

> —The Senate Committee described the provisions of Section 312(a)(7), and then stated that "[t]he duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the [community] of license." S. REP. No. 96, *supra*, at 34.
>
> —The Senate Committee, adopting language used earlier by a House Committee to describe the public interest standard,[15] noted that "[t]he presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest." It stressed that the Commission should "continue to consider" licensee performance under that standard. *Id.* at 28.
>
> —The Senate Committee stated that it had included an "express provision to this effect"—Section 312(a)(7)—"[i]n order to emphasize the public interest obligation inherent in making broadcast time available to candidates." *Id.*

Respondents' claim (FCC Br. 31 n.21) that in stating that the Commission should "continue to consider" compliance with the public interest standard, Congress intended merely to suggest that the existing standard would continue to be applied in *renewal* proceedings, but that a new standard would apply in *revocation* proceedings. The notion that a broadcaster's exposure should be greater in revocation proceedings in which the burden is on the Commission, 47 U.S.C. § 312(d), than in a renewal proceeding, is absurd. It is also inconsistent with

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passage was of little utility because "there is no specific explanation of the statutory language or statement of its intended impact." Pet. App. A at 17a, n.32, 629 F.2d at 12 n.32. The Court nonetheless found that the statute had drastically altered the Commission's preexisting policy. *Id.* at 14a, 629 F.2d at 11.

[15] *See* CBS Br. 25-26, *quoting* H.R. REP. No. 1347, 91st Cong., 2d Sess. 7 (1970).

respondents' view (FCC Br. 20-21 n.9) that the Commission possesses broad authority to apply the standards of Section 312(a)(7) in proceedings other than revocation.

d. Respondents' legislative history argument rests, at bottom, solely on the smidgen of legislative history suggesting that a purpose of Title I of the Federal Election Campaign Act of 1971 was to "give candidates for public office greater access to the media."[16] Contrary to respondents' suggestion (FCC Br. 30), the correlation between this purpose and Section 312(a)(7) is neither "obvious" nor "compelling." The Senate report carefully enumerated the provisions it viewed as directed at the purposes of Title I, and omitted Section 312(a)(7). That omission is entirely consistent with the stated purpose of Section 312(a)(7)—to assure that "no diminution" of political broadcasting would result from the enactment of other provisions of Title I.[17]

e. The legislative history also illuminates the significance of the limitation of Section 312(a)(7) to federal candidates. Contrary to respondents' argument (FCC Br. 23) that the limitation must reflect an intent to create an expanded right for federal candidates, the Senate report shows that Section 312(a)(7) was included to "emphasize" the public interest obligation with respect to "candidates covered by the spending limitation in the legislation"—*i.e.*, federal candidates. S. REP. NO. 96, *supra*, at 28.[18]

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[16] *See* FCC Br. 29-30, *quoting* S. REP. NO. 96, *supra*, at 20.

[17] S. REP. NO. 96, *supra*, at 28. Respondents also rely (FCC Br. 28) on remarks of Senator Pastore in earlier hearings as indicating a desire to afford "greater access." But Senator Pastore's reference to "increas[ing] a candidate's accessibility to the media," *Federal Election Campaign Act of 1971: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 2 (1971), referred to other provisions of the bills introduced in 1971 and not to those concerning the provision of *paid* time at commercial rates to candidates.

[18] Even at this point in the legislative history, it was intended that the section be limited to federal candidates. S. REP. NO. 96, *supra*, at 34, 38.

f. Finally, respondents seek to minimize the significant underlying purposes of the FECA—shortening campaigns and making them less costly (*see* CBS Br. 31)—that would be severely contradicted by the Commission's interpretation of Section 312(a)(7). While, as respondents recognize (FCC Br. 40 n.30), Congress adopted other provisions directed at the goals of shortening compaigns and reducing their costs, this Court should not interpret Section 312(a)(7) in a manner that undercuts the achievement of those goals.

4. Respondents argue (FCC Br. 32-37) that, apart from the contemporaneous history of Section 312(a)(7), subsequent history shows that Congress approved the Commission's present interpretation. As this Court has recently emphasized, subsequent history normally has little value in discerning congressional intent.[19] But to the extent that such history has value, it leads to the opposite conclusion.

In a policy statement issued shortly after Section 312(a)(7) became law in 1972, the Commission described its approach under the public interest standard and emphasized that under Section 312(a)(7), it would "apply the *same test of reasonableness* of the judgment of the licensee."[20] Nothing in the 1972 policy statement suggests that the Commission believed that the section was intended to provide "greater access."[21] In 1973 testimony

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[19] *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S. Ct. 2051, 2060-61 & n.13 (1980); CBS Br. 33-34 n.29.

[20] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C. 2d 510, 538 (1972) (emphasis supplied). Respondents do not even mention this critical statement, but instead rely (FCC Br. 33-35 & n.23) on a reference in the 1972 policy statement to Section 312(a)(7) as creating an "additional specific requirement" for federal candidates. *See* 34 F.C.C.2d at 538. This reference is not inconsistent with the view that the "same test of reasonableness" would apply.

[21] Thus, contrary to respondents' contention (FCC Br. 33), the Commission has not "consistently construed" the statute to create an enlarged individual right of access. In light of the Commis-

before the Communications Subcommittee and in a subsequent letter, Chairman Burch of the Commission cited the 1972 policy statement, and stressed that broadcasters retained wide discretion in responding to access requests by candidates;[22] it was on this basis that the Committee rejected arguments by broadcasters that the statute should be repealed. S. REP. No. 170, 93d Cong., 1st Sess. 6-7 (1973). *See* CBS Br. 32-33 & n.79.

5. Nothing in the other subsequent legislative history cited by respondents (FCC Br. 34-37) shows that Congress has approved or acquiesced in the interpretation of Section 312(a)(7) now advanced by the Commission. The various cited hearings (FCC Br. 35-36 n.27) were concerned almost exclusively with proposals to repeal the fairness doctrine and the equal time requirements with respect to presidential and vice-presidential races, and respondents point to no statement by a member of Congress that in any way suggests an endorsement of the Commission's present interpretation of Section 312(a)(7).[23] Respondents also rely (FCC Br.

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sion's shifting view of the statute's requirements (*see* CBS Br. 33 n.78), its current pronouncements are entitled to little weight. *E.g.*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

[22] *Federal Election Campaign Act of 1973: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 137 (1973) (*"1973 Senate Hearings"*); S. REP. No. 170, 93d Cong., 1st Sess. 7-8 (1973). Nothing in the remarks of Senator Pastore quoted extensively by respondents (FCC Br. 35, *quoting 1973 Senate Hearings, supra*, at 137) suggests that he understood Section 312(a)(7) to create an enlarged right of access for federal candidates.

[23] *Cf. TVA* v. *Hill*, 437 U.S. 153, 191-93 (1978); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). Respondents rely (FCC Br. 36 n.25) on congressional hearings following the Commission's decision in this case, but all those hearings show is that the general counsel of the Commission told the Committee that the issue in this case was before the courts. *Repeal of "Equal Time" Requirements: Hearing Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 42 (1980). A remark by subcommittee counsel, *id.* at 43, is obviously of little value in discerning congressional intent.

36-37 n.26) on the failure of Congress to enact certain bills that would have repealed Section 312(a)(7).[24] These bills, none of which emerged from committee, were not directed at overruling the Commission's interpretation of Section 312(a)(7), but merely included repeal of Section 312(a)(7) as part of comprehensive legislation that would have eliminated or restricted Commission authority to engage in regulation of broadcast programming generally.[25]

II. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THE COMMISSION'S CONSTRUCTION OF SECTION 312(a)(7) DOES NOT INTRUDE INTO THE BROADCASTER DISCRETION THAT CONGRESS INTENDED TO PRESERVE.

1. Even if Section 312(a)(7) did not codify the Commission's prior practice under the public interest standard, Congress nonetheless intended to preserve substantial latitude for broadcaster judgment as to the nature and amount of time to be made available to federal candidates. We have urged (CBS Br. 34-35) that use of a standard of "reasonableness" necessarily invites reference to the Commission's fairness doctrine, which has consistently been interpreted to afford broadcasters a "wide degree of licensee discretion."[26] and that, at a minimum, Congress intended to preserve the same latitude under Section 312(a)(7). Respondents do not even address this argument, save for an oblique reference in one footnote. (FCC Br. 48 n.38.) Indeed, respondents' brief confirms

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[24] S. 1178, § 2, 94th Cong., 1st Sess. (1975); S. 22, § 3, 95th Cong., 1st Sess. (1977).

[25] Failure to enact such bills would have little significance even if they were designed to overrule the interpretation adopted by the Commission. *Zuber* v. *Allen*, 396 U.S. 168, 185-86 n.21 (1969); *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946).

[26] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979).

that, under the Commission's interpretation of Section 312(a)(7), broadcasters have virtually no discretion.

2. Respondents' brief (FCC Br. 46-49) confirms that, under the Commission's decision, the question of when the sale of time to candidates should begin is no longer an editorial decision for the broadcaster. Respondents defend the Commission's assumption of the authority to decide these issues on the ground that "the Commission's determination serves to *narrow* the statute's coverage." (FCC Br. 47.) This argument is specious. Prior to this case, it was clear that broadcasters were entitled to make an editorial judgment that it was too early to sell the requested time.[27] The Commission has not narrowed its role in this area, but has arrogated to itself the sole power to decide this question.[28]

3. Respondents make clear that, under the Commission's approach, "the candidate—and not the broadcaster—[is] the ultimate judge" (FCC Br. 24) of what political programming shall be presented to the viewing public, and that the broadcaster must defer to the needs of the individual candidate. Respondents bluntly reject CBS' contention that broadcasters are entitled to adopt political broadcasting policies designed to treat all candidates in an even-handed manner, urging must defer to the needs of the individual candidate and that a policy of evenhandedness somehow promotes discrimination among candidates (FCC Br. 51). In fact, any danger of favoritism among candidates is clearly greater under a system that requires individualized con-

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[27] As we have noted (CBS Br. 39-40), in earlier cases the mission viewed the question of when the sale of time should begin as within the broadcaster's discretion. *See also, e.g., Anthony R. Martin-Trigona*, 67 F.C.C.2d 743, 746 n.4 (1978).

[28] Indeed, by assuming as well the power to decide that a campaign has *not* begun, the Commission's decision increases the danger of discriminatory treatment by allowing the Commission unilaterally to deny time to a disfavored candidate.

sideration of each candidate's needs. *See* CBS Br. 37. In making this argument, respondents inappropriately downplay the fundamental political broadcasting policy of Section 315, embodied in the Communications Act since the beginning, of promoting equal treatment among candidates (FCC Br. 50-51).

4. Respondents' brief also confirms that the Commission has claimed the power to determine itself the weight that may be given to such countervailing factors as the likelihood of multiple candidate requests. Respondents do not dispute that there are frequently multiple candidates in an election who might request time. Rather, they simply deny that broadcasters have the right to make predictive judgments regarding the likelihood of requests from those candidates.[29] Editorial judgments, however, must necessarily take into account factors and risks that cannot be demonstrated to a certainty.[30] To insist on proof to the Commission's satisfaction is to shift control of those judgments from the broadcaster to the Commission. Moreover, according to respondents, the likely requests that could be considered here are limited to "requests for *equal time*" (FCC Br. 53 (emphasis supplied)) by candidates for the Democratic nomination (FCC Br. 53 n.43). They could not include requests under Section 312(a)(7) by *Republican* candidates, such as those that CBS had already received from candidates for the Republican nomination prior to the Carter Committee's request for time in October 1979. J. A. 77-79. There is no rational basis for limiting consideration to equal time requests under Section 315 and excluding possible requests under Section 312(a)(7).

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[29] As we have pointed out (CBS Br. 38), the option of contacting candidates in advance (*see* FCC Br. 50, 54 n.43) would not meaningfully increase broadcasters' abilities to predict candidate demands over the course of the campaign.

[30] Respondents attempt to rely (FCC Br. 54 n.43) on subsequent events in denigrating the networks' concerns as to multiple candidate requests. However, the reasonableness of a broadcaster's judgment obviously cannot be measured by hindsight.

III. RESPONDENTS HAVE FAILED TO ANSWER CBS' SHOWING THAT SECTION 312(a)(7), AS CONSTRUED BY THE COMMISSION, VIOLATES THE FIRST AMENDMENT.

1. In addressing the constitutional issue raised by this case, respondents assert that the system of access for individual federal candidates created by the Commission under Section 312(a)(7) represents "only a re-allocat[ion] [of] the 'use' of portions of the airways" (FCC Br. 64, *quoting* Pet. App. A at 47a, 629 F.2d at 25), and make the extraordinary suggestion that "with respect to airtime that Congress has reallocated for political use, broadcasters possess no editorial discretion." (FCC Brief 64 n.54.) While Congress might conceivably have adopted a different approach to broadcasting regulation that reserved particular channels or even time periods to specific uses, Congress chose instead to adopt a system that placed in the broadcaster maximum editorial responsibility. *See CBS* v. *DNC*, 412 U.S. at 103-14. As we have shown (CBS Br. 42-44), the system of Commission oversight of broadcaster programming choices involved here cannot in any meaningful sense be considered a "re-allocation" of the spectrum.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969), on which respondents (FCC Br. 63) and *amici* (NCCB Br. 8-9) principally rely, does not establish an unchecked power on the part of the government to negate the editorial choices of broadcasters whom it has charged with performing an editorial function. In *Red Lion*, this Court confirmed Congress' fundamental policy choice that the public's interest in access to ideas would best be served by a system of public trusteeship, in which broadcasters may reasonably determine what should be broadcast in the public interest. This Court upheld the right of reply requirement embodied in the Commission's personal attack rules, a contingent right that is triggered only by an initial editorial decision by the broadcaster and under which a large measure of broadcaster dis-

cretion is thereby preserved.[31] In *CBS* v. *DNC*, this Court reaffirmed the crucial distinction between affirmative rights of access and the right of reply that was upheld in *Red Lion*. 412 U.S. at 126-27.

2. We have urged (CBS Br. 45-47) that the affirmative access system created by the Commission in this case poses significant dangers of government involvement in a "continuing case-by-case determination of who should be heard and when," *CBS* v. *DNC*, 412 U.S. at 127. Respondents seek to minimize these dangers by asserting that Section 312(a)(7), as construed by the Commission, "is largely self-executing." (FCC Br. 66, 68.) To the contrary, the affirmative right of access created by the Commission under Section 312(a)(7) invites frequent application to the agency by dissatisfied candidates and requires frequent subjective determinations by the Commission concerning whether the campaign has commenced, whether the candidate "needs" the requested time, whether the broadcaster's offer is to be deemed "responsive" (*see* FCC Br. 52), and whether "countervailing factors" outweigh candidate needs. Thus, Section 312(a)(7) can in no way be considered "self-executing" or mechanical.

3. Respondents fail to comprehend that the dangers of this access scheme are particularly acute because of the inherent political sensitivity of the determinations the Commission is called upon to make. Remarkably, they make no attempt to address the significant risks of non-neutral decisionmaking, dangers that so troubled Judge Tamm, *see* Pet. App. A at 59a-64a, 629 F.2d at 30-33, and that are inevitable when the beneficiaries of the right of access—federal candidates, especially incumbents—are in a position to influence Commission decisionmaking. These dangers are highlighted

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[31] The Court also upheld the Commission's fairness doctrine, which generally imposes on broadcasters an obligation to provide coverage of controversial issues and to devote time to opposing views. *See* 395 U.S. at 394. Neither of those obligations confers a right of access on any person or group or involves the kind of substitution of broadcaster judgment entailed by Section 312(a)(7).

when the Commission applies a standard that explicitly requires it to pass judgment on the validity of individual candidates' asserted needs.[32]

4. While purporting to recognize that candidates, like all other persons, have no First Amendment right "to demand access to television or radio," (FCC Br. 58 n.49),[33] respondents attempt to justify Commission instrusion into broadcaster editorial judgments on the ground that the "purposes of the First Amendment" are served by granting access to candidates. (FCC Br. 59 n.50.) In *CBS* v. *DNC*, the identical argument was made that even if there was no First Amendment right of access to the broadcast media, potential speakers had a First Amendment "interest" in such access, and that the statute should be construed to afford rights of access. This Court, in finding no such First Amendment interest in providing access, squarely rejected the notion that "every potential speaker is 'the best judge' of what the listening public ought to hear." 412 U.S. at 124.

Contrary to respondents' argument (FCC Br. 58-59), nothing in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), supports the view that Congress may restrict the First Amendment rights of others in order to enhance politicians' ability to present their message to the public. This Court's statement in *Buckley* that a candidate may "vigorously and tirelessly advocate his own election," *id.* at 52-53, was made in the context of this Court's holding that limitations on expenditures by a candidate of his

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[32] The dangers are hardly minimized, as *amici* appear to suppose (NCCB Br. 23), by the Communications Act's prohibition against more than four members of the Commission being members of the same party. It is noteworthy that, in the present case, it was the four Democratic Commissioners who made up the bare majority in favor of President Carter's complaint.

[33] *Amici*'s position, on the other hand, appears to proceed from the erroneous view that political candidates do have a First Amendment right to access to present their views. (*See* NCCB Br. 10, 19 (n.42.)

personal funds violated the First Amendment. The Court emphasized in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48. *See also Consolidated Edison Co.* v. *Public Service Commission*, 100 S. Ct. 2326 (1980); *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978).

5. Respondents' invocation of the interests of federal candidates in presenting their views to the public only highlights the substantial concerns of discrimination raised by the Commission's interpretation of Section 312 (a) (7), concerns to which respondents pay scant attention. Thus, the access system at issue here explicitly discriminates in favor of one class of speakers, federal candidates, despite this Court's recognition in *CBS* v. *DNC* that there exists "no principled means" under the First Amendment to justify according preferential access rights to particular classes of speakers on controversial issues. 412 U.S. at 127 n.21. Moreover, as we have noted (CBS Br. 45), the system also favors wealthy candidates over those who lack funds, and is therefore at odds with the goals of the First Amendment. *See CBS* v. *DNC*, 412 U.S. at 123[34]

6. Nor is the construction of Section 312(a) (7) adopted by the Commission necessary to satisfy the interests of viewers in being informed about political matters. Neither respondents nor *amici* suggest any reason why the public interest standard, which is consistent with the principles laid down by this Court in *Red Lion*, is insufficient to meet the interests of viewers, and we believe the record shows a high degree of awareness on the part of CBS and other broadcasters of their continuing obligations in this respect. At a minimum, the

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[34] Respondents assert only that "[t]he expenditure of funds to promote one's candidacy is itself an aspect of protected free speech" (FCC Br. 59 n.51). Again, this hardly suggests the necessity or appropriateness of government action to favor wealthy candidates.

severe constitutional problems raised by the Commission's construction of Section 312(a)(7) should lead this Court to continue to construe the provision as doing no more than codifying this existing public interest standard.

7. Finally, respondents make no effort to meet our argument (CBS Br. 47-48) that the Commission has failed to adopt clearly defined standards in this First Amendment area or procedures to ensure "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" decision. *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965). Respondents assert only that it is "unnecessary to speculate" about such matters (FCC Br. 69). They apparently believe that broadcasters should not be concerned about the infirmities of this access system because "the Commission has not imposed sanctions of any kind on any broadcaster." (FCC Br. 68.) Such sanguine assurances stand in stark contrast to the Commission's position at the time of its orders in this case. Then the Commission refused to grant a stay pending judicial review and warned of "specific measures" to correct any "further failure to meet obligations which have been substantially and clearly defined." Pet. App. C at 142a, 74 F.C.C.2d at 676. The Commission specifically stated that it might impose sanctions on a licensee that initially rejected a request and failed to convince the Commission of the reasonableness of its position.[35]

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[35] *See* Respondents' Memorandum on Question of Mootness, in Nos. 79-2403, etc. at 3-4 (D.C. Cir. Dec. 19, 1979).

CONCLUSION

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

RALPH E. GOLDBERG
HOWARD F. JAECKEL
CBS INC.
51 West 52 Street
New York, New York 10019

JOSEPH DEFRANCO
CBS INC.
1800 M Street, N.W.
Washington, D.C. 20036

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
TIMOTHY B. DYK
THOMAS W. WHITE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner CBS Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS INC., AMERICAN BROADCASTING COMPANIES, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
STUART ALTSCHULER
VINCENT E. GENTILE
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner National Broadcasting Company, Inc.

Of Counsel:

CORYDON B. DUNHAM
Executive Vice President and General Counsel
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020

HOWARD MONDERER
Vice President, Law, Washington
NATIONAL BROADCASTING COMPANY, INC.
1800 K Street, N.W.
Washington, D.C. 20006

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* The information required by Supreme Court Rule 28.1 is set forth in the Brief of Petitioner National Broadcasting Company, Inc. ("NBC Br.") at 2 n.**.

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REPLY BRIEF OF PETITIONER NATIONAL BROADCASTING COMPANY, INC.

The Brief for the Federal Communications Commission and the United States ("FCC Brief") confirms a number of the most disquieting aspects of the rulings below. The Commission's approach poses a substantial threat to the fundamental assumption of our political system that government will remain neutral in the electoral process, as well as to the concept, long-established as a keystone of broadcast regulation, of deference to reasonable broadcaster judgments. It is all the more striking that this approach has been adopted to implement a statute which neither by its explicit terms nor by its legislative history requires embarking upon so dangerous a course.

I.

The Commission's Interpretation and Application of Section 312(a)(7) Improperly Injects Government Into the Electoral Process and Destroys Broadcaster Discretion.

A. *The FCC's Assumption of Decision-Making Power With Respect to the Commencement of Federal Election Campaigns Poses a Substantial Threat of Government Intrusion Into the Electoral Process.*

The FCC has determined that it should decide, as an "objective" and "independent" matter, when a campaign is "fully underway," since it concludes that access requirements under Section 312(a)(7) attach only at that point (FCC Br. at 46-49). Its brief characterizes this decision as one designed to "narrow" the apparently otherwise unlimited reach of the Commission's understanding of the statute (*id.* at 47). What the Commission apparently views as an interpretation benefiting broadcasters simply illustrates the vice of its basic approach. If anything, such an explanation for the Commission's action and for its departure from its prior policy (under which the broadcaster's decision as to when to make access time available was considered as one element of overall reasonableness)* highlights the fact that the Commission is provided with no guidelines or boundaries for its excursion into the political

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* The Commission remains unwilling to face up to the flat contradiction between its present stance and the holding in *Anthony R. Martin-Trigona*, 66 F.C.C.2d 968 (Broadcast Bureau), *review denied*, 67 F.C.C.2d 33 (Broadcast Bureau 1977), *reconsideration denied*, 67 F.C.C.2d 743 (1978), where its Broadcast Bureau concluded that "[a] licensee's discretion in providing coverage of elections extends not only to the type and amount of time to be made available to candidates, but to the date on which campaign coverage will commence." 66 F.C.C.2d at 969. *Compare* FCC Br. at 46 n.34.

thicket by the statute itself—a statute whose draftsmen never contemplated such a role for the Commission.

Here, for example, the Commission determined that the Presidential campaign was "fully underway" and thereby signalled the opening of the broadcast campaign in an election where, its brief notes, *only* President Carter of all the candidates for that office had qualified for federal matching funds (FCC Br. at 53-54 n. 43).

This illustrates, as well, the dangers raised by the role that the Commission has arrogated to itself in the electoral process. The FCC, an agency whose members are appointed by the President, hereafter is to determine when each Presidential or other federal campaign is "fully underway"; candidates seeking access prior to that date will, the FCC states, have no rights whatever under the statute (*see* FCC Br. at 47). The potential for manipulation of the process by Presidential appointees who seek to hinder (or help) the prospects of particular candidates is apparent.*

B. *The Criteria Set Forth by the Commission for Assessment of a Broadcaster's Reasonableness Were Applied in a Fashion Which Maximizes Government Intrusion and Substitutes the Commission's Judgment for That of the Broadcaster.*

The FCC Brief refers to three factors to be considered in evaluating the reasonableness of a broadcaster's response to Section 312(a)(7) requests: "likely multiplicity of claims for reply time," "significant program disruption," and the "candidate's stated requirements" (FCC Br. at

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* This is particularly true when so amorphous a concept as judging when a campaign is "fully underway" is at issue. The Commission's brief uses this term and the "commencement of the campaign" interchangeably (*compare, e.g.*, FCC Br. at 46 n.34 *with* FCC Br. at 47 & n.37), although the concepts are not identical. This imprecision is characteristic of the subjective criteria used by the Commission as its tools of analysis in this area.

53).* The treatment accorded several of these criteria in the FCC Brief warrants comment.

1. The Candidate's "Needs"

The FCC's initial opinion in this case referred to the "candidate's needs" criterion as one that required "particular emphasis" (74 F.C.C.2d at 642; Pet. JA 87a); the Commission has vainly and inconsistently sought to explain and clarify the meaning of this concept ever since.** The FCC's Brief states that the broadcaster is to balance the "candidate's stated requirements" against the other two criteria—the probability of multiple requests and program disruption

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* Strikingly, the Court of Appeals decision identified *five* such factors (629 F.2d at 20; Pet. JA 35a-38a). The Commission seems to have dropped altogether its reliance on whether or not a request was a candidate's first request (*see* 74 F.C.C.2d at 667; Pet. JA 126a-127a; *see also* 74 F.C.C.2d at 679; Pet. JA 146a (once a campaign is underway "broadcasters must be responsive to the *first* request for a substantial segment of program time on behalf of a candidacy, unless there are compelling reasons for not honoring the request") (Concurring Statement of Commissioner Brown, emphasis in original)). Perhaps the Commission has itself recognized the impermissibility of such an arbitrary rule. Indeed, the emphasis on this criterion by Commissioner Brown in casting the decisive fourth vote itself provides an adequate basis for finding the decision to be arbitrary and capricious.

The fifth factor identified by the Court of Appeals, the timing of the request, seems no longer to be separately considered. Indeed, the FCC recently rejected a broadcaster's effort to give effect to this consideration by requiring a stated period of advance notice for such advertisements. *See Barry Commoner*, 48 R.R.2d 545 (FCC Broadcast Bureau 1980).

As these examples suggest, not the least of the problems that have faced petitioners in this case has been the constantly shifting articulation by the FCC of just what standards it believes should govern the conduct of broadcasters.

** It is primarily in reliance on this criterion of individual needs that the Commission has turned § 312(a)(7) into a statute affording individual candidates the right to "command" specific program lengths, formats, and times. As we discuss *infra*, in Part II, the statute was never intended to effect such a result, so destructive of broadcaster discretion as well as governmental neutrality.

(FCC Br. at 53). But *what* is the broadcaster to balance and how? Is it in some sense to assess the closeness of the fit between the stated purpose and the timing and length of the broadcast time sought by the candidate? The Commission seems to assume this to be the case—*i.e.*, that the broadcaster will evaluate whether the time requested by the candidate is really required to accomplish the candidate's political objectives. This seems a dubious role indeed for the broadcaster to perform under government mandate, subject to government review and the threat of license revocation. Yet there seems to be no alternative interpretation of the Court of Appeals' statement that

> "The [FCC's] decisions allow the broadcaster leeway to demonstrate . . . that a candidate's stated purpose could be accomplished with a lesser amount of time even if there is no probability that the other candidates will request time. Thus in the cases at hand a counter-offer of 15 minutes as opposed to a half-hour *may* have been defensible." (629 F.2d at 20; Pet. JA 37a; footnote omitted, emphasis in original).

What else could the Commission have meant when it concluded that CBS had failed to "explain how its two five-minute offers were responsive to the specific purpose of the complainant's particular request"? Or that "CBS provided no explanation as to how two such short segments could afford enough time for a discussion of subjects as broad as those the candidate intends to discuss"? (74 F.C.C.2d at 668; Pet. JA 128a-129a).

We have raised these questions in the Court of Appeals and in our initial brief to this Court.* The FCC has yet to

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* NBC advised the Commission that it accepted the candidate's statement of needs at face value and considered them in the balancing process without undertaking to "evaluate" those expressed needs (JA 176 n.*). Without explaining how this was unresponsive to its standards, the FCC rejected this response even as it revised the content of the criterion (74 F.C.C.2d at 670-71; Pet. JA at 132a-133a; *see also* 74 F.C.C.2d at 667-70; Pet. JA at 126a-131a).

provide any substantive answer. We urge the Court to compare the statements of the FCC and the Court of Appeals quoted above with the discussion in the FCC Brief at 49-50 and particularly at 50 n.40. (*See also* 74 F.C.C.2d at 642, 667-68; Pet. JA 87a-88a, 127a-128a).* The criterion of "candidate's needs" remains, as it has been from the outset, a dangerous threat to reasoned decision-making, devoid of articulated content, and holding the potential for sucking broadcaster and Commission alike into the political maelstrom.

2. Multiplicity of Candidates

This standard too has evolved during the course of the Commission's defense of its actions in this case. Obviously, when a broadcaster considers a particular candidate's request, it must consider the possibility of requests from other candidates both for access under Section 312(a)(7) and for equal time under Section 315(a). In its 1978 Report and Order, the FCC recognized as relevant the existence of "a multiplicity of candidates." 68 F.C.C.2d 1079,

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* While the Commission now characterizes the "candidate's needs" as an essential and inherent factor under § 312(a)(7), that view was not apparent in its initial interpretations of the statute. Thus, the Commission made no mention of the "candidate's needs" in its initial summary of broadcasters' obligations under § 312(a)(7), *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510 (1972). Nor did it refer to such a standard in its subsequent *Public Notice Concerning Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516 (1974). Although the concept was referred to in the 1978 Report and Order, *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1089-90 (1978), the scope and emphasis now given to this factor were hardly made apparent there. In fact, despite the asserted crucial nature of the "candidate's needs", two weeks after releasing its 1978 Report and Order the Commission issued a comprehensive "Primer" which purports to cover the entire field of political broadcasting, yet omits any reference to this factor in dealing with § 312(a)(7). *See The Law of Political Broadcasting and Cablecasting*, 43 Fed. Reg. 36342, 36349-50, 36382-84 (1978).

1090 (1978). In keeping with this standard NBC put before the Commission in its response to the complaint in this matter the fact that at that time (November 1979), 12 candidates who had held federal elective office or a gubernatorial post, as well as 60 other candidates for the Presidency, had filed with the Federal Election Commission (JA 61). The FCC swept aside this submission, one geared to its announced standards. It announced a new standard, essentially insisting that the broadcaster adduce evidence of the candidates' actual intentions through interviews or other means (74 F.C.C.2d at 650-51; Pet. JA 101a). (The broadcaster is presumably to transmit these intentions to the FCC in the event of a challenge to the broadcaster's access decision.)

The FCC Brief now brings to its logical conclusion the transmutation of a useful tool for judging broadcaster reasonableness into one which obscures any rational review and intrudes still further into the political process. That Brief emphasizes the Commission's independent assessment of the facts and its conclusions that financial constraints would limit many candidates and that as of the date of the request for time "President Carter alone had qualified for federal matching funds" (FCC Br. at 53-54 n.43). It is an extraordinary argument which can rely upon the conclusion that but a *single* candidate was in a position to make use of national television at a given time to justify the government compelling a grant of broadcast time to *that* candidate—the incumbent President of the United States.*

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* In that same passage in its brief, the FCC also seeks to minimize the conceded fact that a "dozen major candidates" existed at the time of the Carter-Mondale request by asserting that "only candidates for the *Democratic* nomination . . . would be entitled to 'equal opportunities' under Section 315(a)" (FCC Br. at 53 n.43). In fact, however, the Commission's opinion itself recognized that "we cannot conclude that NBC acted unreasonably in considering the Republican candidates as well as the Democratic candidates in determining whether a 'multiplicity of candidates' problem in fact existed" (74 F.C.C.2d at 647; Pet. JA 96a).

3. Rejection of Any Uniform Policy Towards Candidates

The FCC Brief explicitly rejects the suggestion that a broadcaster may adopt uniform policies regarding requests for time by candidates for a given office, asserting that such policies in and of themselves would violate Section 312(a)(7) (FCC Br. at 50). This approach represents a striking departure from the policy followed under the public interest standard codified by Section 312(a)(7), as well as from the basic principle of equality reflected, since 1927, in the equal opportunities provisions of Section 315 (a). *See e.g., Humphrey for President Campaign,* 34 F.C.C. 2d 471 (1972); *W. Roy Smith,* 18 F.C.C.2d 747, 747-48 (Broadcast Bureau 1969); *Rosenbush Advertising Agency, Inc.,* 31 F.C.C.2d 782 (1971). Uniformity and evenhandedness of broadcaster policies ensure equality of treatment, avoid entangling broadcasters in the political process, and permit rational planning on the part of all. The FCC's recent rejection of this approach is premised on its understanding that individual political candidates are the intended "beneficiaries" of Section 312(a)(7) (FCC Br. at 51) and, as such, their specific needs and desires must be satisfied and the broadcaster must "tailor its response as much as possible to accommodate the request" (FCC Br. at 43). But the statute is not designed to benefit any individual candidate as such; it is designed to improve the campaign process itself (*see* NBC Br. at 48). The Commission's failure to accept this principle has led it down a path which entangles it impermissibly in the electoral process, which gives rise to an appearance of favoring one candidate for high office over another, and which compels broadcasters to evaluate the needs and tactics of individual candidates. Nothing in the language or history of Section 312(a)(7) supports such a result.

C. *The FCC's Failure to Defer to Reasonable Broadcaster Discretion Upsets the Delicate Balance of the System of Broadcast Regulation.*

The FCC Brief pays lip service to the general principle that it is obliged to defer to reasonable licensee judgments under Section 312(a)(7) (FCC Br. at 43-44). It states (FCC Br. at 55):

> "[T]he Commission was prepared in this case to listen to any reasonable explanation offered by the networks for their refusal to provide time. That explanation was never forthcoming."

That statement is demonstrably inaccurate. A consideration of the record manifests the extent to which the concept of deference to reasonable broadcaster decisions has been abandoned.

NBC provided the Commission with a specific and detailed explanation of the basis for its decision, addressing all of the criteria set forth in the Commission's 1978 Report and Order. The earliness of the requested broadcast dates relative to the campaign and the election itself, the local focus of the campaign in December 1979, the existence of at least a dozen major candidates for the Presidency, and programming considerations which increased the difficulty of accommodating the Carter-Mondale Committee's request on the four dates specified by the Committee (and accommodating as well potential time requests from other candidates) were all set forth as bases of NBC's decision (JA 60-74).

In response to these submissions, the FCC has offered a series of shifting grounds for its own decision, first finding that NBC was unreasonable in taking into account the earliness of the requested broadcast dates relative to the campaign (74 F.C.C.2d at 645-47; Pet. JA 91a-94a), then finding (contrary to its prior rulings) that this was not a factor to be judged by the reasonableness standard at

all (74 F.C.C.2d at 666-67; Pet. JA 124a-127a); first finding that a candidate's needs should be given "particular emphasis" and that this involves broadcaster evaluation of those needs (74 F.C.C.2d at 642; Pet. JA 87a), then backing away from those statements without providing any content to the concept of "candidate's needs" and while still charging the broadcasters with having failed to explain how they applied this formless criterion (74 F.C.C.2d at 667-68; Pet. JA 127a-129a); first finding that NBC was entitled to consider Republican as well as Democratic candidates in its assessment of multiple candidacies and the availability of time to accommodate possible additional requests (74 F.C.C.2d at 647; Pet. JA 96a), now stating that only Democrats should be considered (FCC Br. at 53 n.43); first finding, based on its own independent evaluation of financial constraints on candidates, that there existed no likelihood of significant requests for equal time (74 F.C.C. 2d at 647; Pet. JA 96a), now asserting that, in fact, only one candidate qualified for federal matching funds in the very campaign it determined was "fully underway" (FCC Br. at 53-54 n.43). The list could be extended, but we think the point is clear.* NBC has supplied a reasoned explanation of the basis for its decisions. That the Commission can state that no such explanation was provided suggests more about the shifting bases of the Commission's standards and its single-minded rejection of each explanation put forth by NBC and the other networks than about the adequacy of the explanatory effort. As Commissioner Lee recognized in his dissent from the Commission's holding:

> "By the time the majority finishes its analysis of the networks' reasons for not giving time, the networks do not have any choice other than to give the requested time. No other weighing of factors is reasonable in the

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* For a discussion of other inconsistencies in the Commission's application of § 312(a)(7), see NBC Br. at 25-26n.**.

view of the majority" (74 F.C.C.2d at 681; Pet. JA 149a-150a; footnote omitted).

* * *

The dangers to the broadcast and electoral system alike in the path followed by the FCC here are manifest. What is most striking is that these dangers are courted not in the service of a clearly mandated congressional command, but (1) in response to an agency interpretation of the statute without support in its language or legislative history, (2) in the face of a well-established congressional insistence on equal treatment of candidates (manifested in Section 315(a)), and (3) despite a long-standing congressional distrust of common carrier or initial access schemes. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979).* *See also* NBC Br. at 28-34.

II.

The Decision Below Is Based on an Interpretation of Section 312(a)(7) Which Is Contrary to the Legislative History and Intent of That Provision.

The FCC Brief does not dispute the simple reality that the law as it existed prior to the enactment of Section 312(a)(7) did not vest an affirmative right of initial access such as the Commission now claims for Section 312 (a)(7). (FCC Br. at 22). Instead, the FCC asserts that the draftsmen of Section 312(a)(7) clearly intended to

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* In referring to the congressional antipathy towards common carrier systems incorporated in § 3(h) of the Communications Act (47 U.S.C. § 153(h) (1976)), we do not suggest, as the FCC Brief seems to conclude (at 26 n.16), that the congressional proscription of common carrier treatment itself presents an absolute bar to the Commission's interpretation of § 312(a)(7). Rather, we urged that so clear and repeated is the congressional disinclination to create common carrier status or its functional equivalent—and so serious the constitutional consequences of such action—that § 312(a)(7) should not be interpreted as the Commission suggests in the absence of the clearest manifestation of congressional intent.

and did create a statute significantly expanding access rights already existing under the "public interest" standard. This is an essential element of the FCC position, for it has been well-established that the public interest standard created no "entitle[ment] to demand of a particular station a specific amount of time in a specific format (in the absence of a use of the station by another legally qualified candidate for the same office under Section 315)." *Hon. Dan Walker*, 57 F.C.C.2d 799, 800 (Broadcast Bureau 1975). *See Humphrey for President Campaign*, 34 F.C.C.2d 471, 472 (1972); *Rosenbush Advertising Agency, Inc.*, 31 F.C.C.2d 782 (1971); *W. Roy Smith*, 18 F.C.C.2d 747 (Broadcast Bureau 1969). Despite its protestations to the contrary, the Commission's requirement of deference to the candidate's stated campaign needs creates precisely such an entitlement here.* Neither the language of the statute nor its legislative history supports this view.

The FCC Brief frequently refers to the "plain meaning" of Section 312(a)(7) and to its literal language and asserts that the meaning of this language is "unambiguous" (FCC Br. at 19, 20 n.8). It is difficult to reconcile this position with the FCC's own recognition in its opinions in this very case that the "statutory language does not expressly define the scope of the Commission's responsibilities or the procedures by which it should enforce them" (74 F.C.C.2d at 637; Pet. JA 78a), and that "the legislative history of Section 312(a)(7) does little to clarify those responsibilities and procedures" (*id.*). It is this statute whose "plain meaning" the FCC now urges resolves all questions and authorizes the extraordinary inroads upon governmental neutrality and broadcaster discretion discussed in our main brief (NBC Br. at 17-33).**

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* This is particularly evident with respect to a "first request" which, absent proof of "compelling reasons," must apparently always be honored (74 F.C.C.2d at 679; Pet. JA 146a).

** Were this not enough to suggest the fatuousness of the appeal to the literal meaning of the statute as the answer to all ques-

The FCC's interpretation of the meaning of Section 312 (a)(7) as creating a sweeping new right is not one which flows from any "literal" reading of the statute. The statute, by its terms, states a specific penalty for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." It does *not* by its terms create any rights on the part of anyone; it was added as part of a section that provides specific penalties for acts or omissions by licensees. None of the seven paragraphs of Section 312(a) purports to establish in itself the nature of the obligation owed by the licensee; rather, the listing is designed to describe the violations or omissions to which the sanction of license revocation may be applied.* This contrasts starkly with provisions of the Communications Act such as Section 315(a), which both in title ("Facilities for candidates for public office") and in substance** imposes specific duties on broadcasters. Un-

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tions, that point may also be illustrated by the instances in this case in which the FCC itself has declined to find the "literal meaning" of the statute to control. Thus, the statute refers only to "broadcast stations," not to television networks. The Commission chose not to rely on this literal language, but instead to determine "the legislative intent" (74 F.C.C.2d at 639-40; Pet. JA 81a-82a). The question of whether § 312(a)(7) reaches "networks" has not been argued on this petition; the FCC's treatment of the issue casts still further doubt, however, upon its new assertion that anything akin to a "literal" reading of the statute has been adopted here.

Similarly, the FCC Brief emphasizes still another departure from any literal reading of the statute in what it describes as the Commission's limiting construction designed to "narrow the statute's coverage" by restricting the candidate's access rights to the period when a campaign is "fully underway" (FCC Br. at 47). The recognition that the literal reading—at least the FCC's literal reading—extends too far is suggestive of the impropriety of the basic interpretation put forth by the FCC.

* The full text of § 312(a) is set forth in a Statutory Addendum to this Reply Brief.

** "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, *he*

der these circumstances, Section 312(a)(7) can hardly be read to *create* a new substantive right, rather than to recognize and provide a sanction to aid enforcement of existing rights.

The legislative history of the section fully supports this interpretation. The FCC Brief seeks to avoid the impact of that history by quoting excerpts out of context rather than quoting the relevant passages in full, and by ascribing to Section 312(a)(7) purposes it was not meant to serve while endorsing interpretations which frustrate other general purposes of the legislation.*

The two detailed discussions of the purposes underlying passage of Section 312(a)(7) are those included in S. Rep. No. 96, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1773, set forth in full at pp. 41-42 of our main brief. The FCC Brief does not seem to dispute this, but it obscures the significance of these discussions by never quoting them in full and by separating passages which are contiguous in the Senate Report so as to suggest a meaning which is absent when the text is read in its original form. *Compare* FCC Br. at 30-31, nn. 20 & 21, *with* NBC Br. at 41-42. Thus, the FCC Brief at 31 n.21 refers to the asserted "separate treatment" accorded the (preexisting) public interest standard in the Senate Report. In fact the passage relied upon follows directly the Report's description of Section 312(a)(7);** the FCC Brief reproduces the consecutive sentences

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shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ." 47 U.S.C. § 315(a) (emphasis added).

* These other general purposes were the shortening of political campaigns and rendering them less expensive. *See* NBC Br. at 46-47.

** The passage in full text is as follows:

"Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable

in separate footnotes, thereby creating out of whole cloth the "separate treatment" to which it refers—a separate treatment not present in the legislative history.

The FCC Brief also attempts to minimize the Senate Report's emphasis on the continuing nature of the obligation by again trying to create a dichotomy between then-existing law and the asserted new goal of the legislation. In this case it takes two words appearing six pages apart in the Senate Report and joins them in an effort to suggest that only the "general" obligation would "continue" while a new obligation was also being imposed.* In fact the

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> access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a l[e]gally qualified candidate for Federal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.
>
> "The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the comm[unities] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).*" S. Rep. No. 96, 92d Cong., 1st Sess. 34 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 1787.

The FCC Brief at n.20 quotes a portion of the first paragraph. It then refers at n.21 to the assertedly "separate treatment" accorded the general public interest standard and quotes a portion of the second paragraph.

* The FCC Brief states at 31 n.21:

> "Congress intended that this 'general' public interest requirement would 'continue' to be enforced at three year intervals in the license renewal context, not in license revocation proceedings (*id.* at 28)."

Neither the phrase "general" public interest nor any variant thereof appears in the passage at p. 28 of the Senate Report cited by the FCC, but a similar phrase appears as part of the passage of the Report quoted at 14 n.** of this Reply Brief; as is evident, that passage provides no support for the FCC's position. The reference to the expectation that the FCC would "continue" to enforce the existing obligation does in fact appear at p. 28 of the Senate Report, in the context of a passage, quoted in the text *infra* at 16, which explicitly refutes the Commission's position.

reference in the Senate Report itself to the obligation which would "continue" makes clear that Section 312(a)(7) was not intended to expand or alter existing substantive principles (as opposed to enforcement sanctions):

> "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, *and the FCC should continue to consider the extent to* which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. *Certainly no diminution in the extent of such programming should result from the enactment of this legislation.*
>
> *"In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation, S. 382 contains an express provision to this effect."* S. Rep. No. 96, *supra*, at 28, *reprinted in* [1972] U.S. Code Cong. & Ad. News 1781-82 (emphasis added).*

The fragmented presentation of the legislative history in the FCC Brief is echoed by its bold attribution to Congress of a purpose never identified with Section 312(a)(7). Thus, the FCC states: "And when, in 1972, Congress enacted Section 312(a)(7), it unambiguously stated the objective: to 'give candidates for public office greater access to the media . . .'" (FCC Br. at 14; *see also id.* at 30). Yet the passage relied upon (S. Rep. No. 96, *supra*, at 20, *reprinted in* [1972] U.S. Cong. & Ad. News at 1774) as "unambiguous" does not even mention Section 312(a)(7) as a tool for accomplishing this purpose, although it ex-

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* This passage also sets forth a clear explanation of a basis for limiting § 312(a)(7) to federal candidates since only such candidates were "covered by the spending limitation in the legislation." *Compare* FCC Br. at 23 n.13.

plicitly refers to those sections that *are* designed "to accomplish" that purpose.*

The legislative history of Section 312(a)(7) canvassed above and in our initial brief suggests the limited purposes

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* The full passage in the Senate Report is as follows (the first paragraph is quoted in the FCC Brief at 30):

> "The purpose of title I is twofold. It attempts to give candidates for public office greater access to the media so that they may better explain their stand on issues, and thereby more fully and completely inform the voters.
>
> "Second, it attempts to halt the spiraling cost of campaigning for public office. *Voters' Time*, a report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, eloquently demonstrated this fact. This problem seems to be rapidly increasing.
>
> "To accomplish its purpose, Title I, as amended, would do the following:
>
> "1. Make the equal opportunities requirement of section 315(a) of the Communications Act, as amended, inapplicable to the use of broadcast facilities by legally qualified candidates for President and Vice President in primary and general election campaigns.
>
> "2. Require that broadcast licensees charge legally qualified candidates for any public office no more than their lowest unit rate during the 45 days before a primary election, and 60 days preceding a general or special election.
>
> "3. Establish reasonable and adequate limitations on the amount of money that may be spent for use of the broadcast media and nonbroadcast media by or on behalf of legally qualified candidates for the offices of President, Vice President, United States Senator or Representative, Delegate or Resident Commissioner to the Congress (Federal elective office) in primary, general and special elections.
>
> "4. Require that 45 days before a primary election and 60 days before a general election any person who charges a legally qualified candidate for the office of President, Vice President, United States Senator or Representative, or Delegate or Resident Commissioner (Federal elective office) for space in the nonbroadcast Communications media (newspapers, magazine, and other periodical publications, and billboard facilities) do so at the lowest unit rate charged others for the same amount of space.
>
> "5. Enable the States by law to adopt spending limitations in the broadcast media for candidates for state and

of the section:* to reduce to statutory form existing obligations, to provide a specific, severe penalty for willful or repeated violation of that obligation without regard to broadcaster performance in other areas, and to ensure that other changes in the overall regulatory structure—including expenditure limitations and elimination of equal time requirements (the latter eventually not enacted)—did not lead to a "diminution" of time made available to political candidates.** The Congress which enacted Section 312(a)(7)***

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local office." S. Rep. No. 96, *supra*, at 20-21, *reprinted in* [1972] U.S. Cong. & Ad. News 1774.

The FCC Brief at 30 n.19 attempts to avoid the omission of § 312(a)(7) from this passage by referring to other passages which *do* refer to § 312(a)(7). The passages referred to do not link § 312(a)(7) to the purpose of providing "increased access."

* This Court has similarly recognized the narrow scope of the statute. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 113-14, n.12 (1973). We believe the FCC's discussion (FCC Br. at 37-40) of this Court's analysis is clearly at odds with the language of the footnote in question and the text to which it relates. The passage in this Court's opinion correctly states the law (as then urged upon this Court by the Commission) and we urge this Court to reaffirm that statement. (*See* NBC Br. at 37-40.)

** The FCC Brief ascribes considerable significance to the "conforming amendment" added to § 315(a) at the time § 312(a)(7) was enacted (FCC Br. at 31-32). As pointed out in our initial brief (NBC Br. at 45 n.*), the amendment essentially restored language originally contained in § 315(a) but dropped when the section was codified. The 1971 amendment, noting merely that "[n]o obligation is imposed *under this subsection* upon any licensee to allow the use of its station" by any candidate is functionally identical to the original "[n]o obligation is *hereby* imposed" language of § 315(a) (emphasis added). Neither phrase in any way defines the scope of any "access" and the 1971 "conforming" amendment in no way suggests any alteration of the existing law. The amendment reflects the fact that the approach previously embodied in the Commission's public interest standard was put in statutory form for federal campaigns by § 312(a)(7); it certainly does not alter the conclusion apparent in the history of § 312(a)(7) itself that the section was merely intended to codify that public interest obligation.

*** The FCC's treatment in its Brief of the subsequent legislative history of § 312(a)(7) is less than persuasive. The FCC

did not contemplate and most certainly did not authorize the creation of an individual right of initial access on "command" (*Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 113 (1973)), to say nothing of one implemented by the FCC under an approach so fraught with danger for the political and broadcast systems.*

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claims that in 1973 it brought its present interpretation of the statute to the attention of Congress in the form of its 1972 Public Notice, and that Congress, through Senator Pastore, explicitly endorsed this approach (FCC Br. at 34-35). Neither the 1972 Notice nor any other FCC policy statement or ruling existing at the time, however, even remotely suggested that an individual right of initial access had been created which allows a candidate to command access in conformity to his stated needs and which in so doing forbids uniform and even-handed policies sanctioned under the very public interest standard which § 312(a)(7) embodied. Indeed, FCC Chairman Burch stated that the Commission had approached with caution the "difficult questions" arising under § 312(a)(7), in view of its "somewhat ambiguous statutory language and meager legislative history." *Federal Election Campaign Act of 1971: Hearings on S. 372 Before the Communications Subcomm. of the Senate Comm. on Commerce,* 93d Cong., 1st Sess. 137 (1973). See also the more recent reference of the FCC's general counsel to the "very difficult legal and interpretive and constitutional questions that concern section 312(a)(7)". *Repeal of "Equal Time" Requirements: Hearing on H.R. 6103 Before the Communications Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. 37 (1980). It is this statute which the Commission now urges is clear on its face.

* Contrary to the FCC Brief at 36 n. 25, it is not the case that the House Subcommittee on Communications, in recent hearings, was "advised of the manner in which the Commission had interpreted Section 312(a)(7) in the instant case and expressed no disapproval" (citing *Repeal of "Equal Time" Requirements, supra,* at 42). In fact, members of the Subcommittee, inquiring into the effect on § 312(a)(7) of a proposed repeal of the equal time provisions of § 315(a) with respect to free time afforded to Presidential candidates, were merely told by the FCC's general counsel that "the question of what 312(a)(7) does require is now being litigated in the court of appeals and one of the issues in that case is whether 312(a)(7) imposes an individual obligation to provide time, or only codifies the long-standing obligations to provide time in general." *Repeal of "Equal Time" Requirements, supra,* at 42.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

FLOYD ABRAMS
DEAN RINGEL
PATRICIA A. PICKREL
STUART ALTSCHULER
VINCENT E. GENTILE
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 825-0100

Attorneys for Petitioner National Broadcasting Company, Inc.

Of Counsel:

CORYDON B. DUNHAM
Executive Vice President
and General Counsel
NATIONAL BROADCASTING
COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10020

HOWARD MONDERER
Vice President, Law, Washington
NATIONAL BROADCASTING
COMPANY, INC.
1800 K Street, N.W.
Washington, D.C. 20006

February 21, 1981

After a confused exchange with a member of the Subcommittee that never even referred to this issue, the FCC's counsel concluded: "I think it is just not clear how those provisions [*i.e.* § 312(a)(7) and the proposed partial repeal of § 315(a)] would operate together. I am sorry not to satisfy you in interpreting section 312 (a)(7), but it is a very difficult provision." *Id.* at 43. Moreover, counsel for the Subcommittee did *not*, as the FCC Brief at 36 n.25 states, "agree[ ] with the view that Section 312(a)(7) creates a right of access for *individual* federal candidates" (emphasis in original). The Subcommittee counsel did nothing more than repeat the language of the statute itself. *See Repeal of "Equal Time" Requirements, supra,* at 43.

STATUTORY ADDENDUM

STATUTORY ADDENDUM

47 U.S.C. § 312(a) provides:

"**§ 312. Administrative sanctions**

(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

"(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

"(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

"(3) for willful or repeated failure to operate substantially as set forth in the license;

"(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

"(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

"(6) for violation of section 1304, 1343, or 1464 of title 18; or

"(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

October Term, 1980

CBS INC. ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF NATIONAL CITIZENS COMMITTEE FOR BROADCASTING NATIONAL BLACK MEDIA COALITION AMERICANS FOR DEMOCRATIC ACTION UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION STEWART RAWLINGS MOTT NATIONAL UNITY CAMPAIGN FOR JOHN ANDERSON JAMES L. BUCKLEY NATIONAL EDUCATION ASSOCIATION REP. ALBERT GORE, JR. REP. BILL FRENZEL AND JEROME BARRON

HEIDI P. SANCHEZ
(Counsel of Record)
ANDREW JAY SCHWARTZMAN
DEBORAH C. COSTLOW

MEDIA ACCESS PROJECT
1609 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 232-4300

Counsel for Amici Curiae

January 22, 1981

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED

1. Whether the requirement of Section 312(a)(7) of the Communications Act of 1934, as amended (47 U.S.C. § 312(a)(7) (1976)), that broadcasters "allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy" promotes First Amendment objectives.

2. Whether the Federal Communications Commission was justified in determining, based on the record in this case, that the three commercial television networks failed to provide reasonable access to a federal candidate.

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INTEREST OF AMICI

The *amici curiae* represented in this brief share an interest in the maintenance of a well-informed electorate through exposure to broadcast media presentations by candidates for elective office. They include members and representatives of the listening and voting public, as well as persons who have been and may again be federal candidates and

office holders whose access to the electronic media is protected by Section 312(a)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(a)(7) (1976). The issues to be resolved by the Court profoundly affect *amici*'s rights. All parties have agreed to *amici*'s participation, and written consents are being filed today with this Court.

The *amici* strongly support the respondents in this case. The U.S. Court of Appeals for the D.C. Circuit carefully and thoroughly reviewed the decisions of the Federal Communications Commission (Commission) below. The court properly concluded that the Commission's analysis of the issues before it reflected a thoughtful balancing of delicate, often competing First Amendment interests. The Commission's approach held government oversight of licensee discretion to the minimum necessary to ensure that the public's right to receive political speech would not be unreasonably restricted. *Amici* believe that the First Amendment is significantly advanced, not jeopardized by the court's decision below. Without disregarding any of the interests the First Amendment protects — those of speakers, opponents of speakers, and listeners, as well as those of the disseminators of the speech of others — the court correctly recognized that the most critical interest the First Amendment protects is that of the listeners who comprise the electorate. The proper balance is never more important than when, as here, the speech in question is political speech, directly related to the development of a well-informed electorate able to govern itself intelligently.

The *amici* represent no single part of the political spectrum; their concern is genuinely non-partisan. They believe that notwithstanding petitioners' suggestions that the Commission's split decisions may have been politically motivated, the decisions in fact resulted in a responsible, sound approach that protects the rights of all federal can-

didates, regardless of party, and of all members of the public to have access to some political speech. *Amici* believe that both the Commission and the Court of Appeals properly interpreted Congress' intent in enacting Section 312(a)(7) of the Communications Act, and that the provision, as applied in this case, is fully consistent with, and promotes, the First Amendment.

The National Citizens Committee for Broadcasting (NCCB), a Washington, D.C.-based nonprofit, nonpartisan public interest group with a national membership of approximately 10,000 individuals and media reform groups, participated as a party before the Federal Communications Commission[1] and as an *amicus curiae* before the U.S. Court of Appeals below[2] because NCCB's members have an interest in receiving viewpoints of candidates seeking public office. NCCB supported the complaint filed by the Carter-Mondale Presidential Committee, Inc. (CMPC) against the three commercial television networks, and NCCB later supported the Commission decisions and now supports the Court of Appeals' decision in this case, not because NCCB endorsed any particular candidate for President, but because NCCB believes the networks' refusals to sell any of the broadcast time CMPC had requested denied unreasonably the public's right to exposure to political debate.

The National Black Media Coalition is a nonpartisan grassroots membership organization concerned with national and regional issues as to programming and media

[1]NCCB's comments filed with the Commission are included in the Joint Appendix, J.A. 115-22.

[2]NCCB was joined in the *amicus curiae* brief before the Court of Appeals by National Black Media Coalition, Americans for Democratic Action, United Food & Commercial Workers International Union, Stewart Rawlings Mott, The Anderson for President Committee, James L. Buckley, National Education Association, Rep. Albert Gore, Jr., Rep. Bill Frenzel, and Jerome Barron.

control. It believes the public benefits from access to diverse viewpoints, not just those supplied by concentrated media interests.

Americans for Democratic Action is a progressive independent political action organization made up of a coalition of liberals from all segments of the public. Its members include academicians, business people, trade unionists, grassroots activists, elected officials, church leaders, professionals, and federal candidates. Prior to the August, 1980, Democratic national convention, ADA had endorsed the candidacy of Senator Edward M. Kennedy. Nevertheless, ADA's belief that the networks acted unreasonably in denying the request of the CMPC, stems from ADA's nonpartisan concern for the protection of the public's right to hear the views of all candidates seeking public office.

The United Food and Commercial Workers International Union is a Washington, D.C.-based, 1.3 million-member labor organization representing workers employed in the food and retail industries. Its members have an interest in hearing viewpoints expressed by federal candidates for public office.

Stewart Rawlings Mott is a citizen interested in receiving information presented by federal candidates, and in providing assistance to federal candidates who wish to present themselves to the electorate. He regularly contributes to the campaigns of candidates to enable them to address the public. In 1980, he aided, among others, the campaign of *amicus* Rep. John B. Anderson, who was a Republican, and then an independent, candidate for the Presidency of the United States. In 1976, Mr. Mott was a plaintiff in the case involving the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971 whose outcome in this Court[3] dramatically shaped

[3] *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

the way that federal elections were conducted in 1980. The same Act (FECA) also gave rise to the dispute presently before the Court.

The National Unity Campaign for John Anderson was created to promote the independent candidacy for the Presidency[4] of Rep. John B. Anderson. Rep. Anderson was listed on the ballot in all fifty states and the District of Columbia, and received sufficient votes to qualify for retroactive federal funding. Prior to this campaign, Rep. Anderson was a federal candidate for the House of Representatives every two years since Section 312(a)(7) was enacted. Rep. Anderson believes that the ability of future independent federal candidates to obtain access to the broadcast media will be particularly jeopardized by a reversal in this Court of the decision below, since broadcasters have consistently been unwilling to provide coverage of, or access to, non-major party candidates.[5]

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[4]The campaign conducted by Rep. Anderson for the Republican Presidential nomination, prior to his April, 1980 announcement of his independent candidacy, was promoted by The Anderson for President Committee. That committee joined with the original group of *amici* participating before the court below.

[5]The differential treatment accorded major and third-party candidates has been acknowledged by the networks and justified by them as an appropriate editorial judgment. See, for example, statement of Julian Goodman, President, National Broadcasting Co., Inc., *The Political Broadcast Act, Hearings on S.3637 and H.R. 13721,* 91st Cong., 2d Sess. (1970), at 88:

> . . .[T]hree years ago, I pledged that the NBC Television Network would make available a total of four prime time half hours for appearances by the Presidential and Vice Presidential candidates of the major parties in the 1968 campaign. I proposed to offer the time without charge, for the candidates to use as they saw it, if Section 315 could be amended to enable us to do this. It was regrettable that the offer failed because there was no legislative sanction that would protect the network and its affiliated stations from having to offer the same number of evening half hours to

James L. Buckley was a member of the U.S. Senate, representing New York State from 1971-77. He was elected on the Conservative Party ticket. Mr. Buckley was also the named plaintiff in *Buckley* v. *Valeo, supra* note 3. During the 1976 election campaign, Senator Buckley, a federal candidate, filed a complaint under Section 312(a)(7) of the Communications Act which resulted in a finding that several stations had unreasonably denied him access, *Senator James L. Buckley*, 63 F.C.C.2d 952 (1976). In the election year just completed, Mr. Buckley was the Republican candidate for the U.S. Senate in Connecticut.

The National Education Association is the largest teacher organization in the United States, with a membership of approximately 1.8 million educators. The NEA has a long-standing commitment not only to equality of access to the communications media in this country, but also to the right of every citizen in our democracy to receive diverse information from the media. Thus, an NEA resolution recognizes the total educative effect of the communications media, whose obligations should be to provide full, constructive and accurate presentations.

Rep. Albert Gore, Jr. is a third-term Democratic Congressman representing the Fourth District of Tennessee. He may well be a federal candidate again in the future. Representative Gore has been a member of the Subcommittee on Communications of the House Interstate and Foreign Commerce Committee. Rep. Gore supports the right of

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at least ten other Presidential candidates, ranging from the Theocratic to the National Hamiltonian parties.

Even with the enactment of Section 312(a)(7), broadcasters remain quite free to cover campaigns differentially: it is only candidate access that is regulated (equality of opportunity under Section 315(a) of the Communications Act and reasonable access under Section 312(a)(7)).

the electorate to receive political information freely through the broadcast media so that they may exercise their franchise more actively and intelligently.

Rep. Bill Frenzel is a Republican who represents the Third District of Minnesota. Currently in his sixth term, he may again be a federal candidate in the future. Rep. Frenzel believes that the fundamental issues at stake in this case transcend party lines.

Jerome Barron joins this brief in his individual capacity. As a professor and scholar of mass communications law and the First Amendment, Mr. Barron has a special interest in developing modes of legal protection for public rights of access to the media.

SUMMARY OF ARGUMENT

In our democracy, the public's First Amendment right to hear political speech is central to creating an informed electorate. Radio and television, using resources that belong to the public, today play a unique and dominant role in disseminating information necessary to make intelligent choices in the voting booth. While broadcasters have been afforded extremely broad discretion in carrying out their mandate to serve the public interest, their rights are derivative from, and subsidiary to, the rights of candidates to speak, and of listeners to hear.

To protect against broadcaster monopolization of the airwaves to the exclusion of office seekers, Congress in 1972 enacted Section 312(a)(7) of the Communications Act to lay out a specific scheme to implement the objective of ensuring the availability of candidate speech. That provision requires broadcasters to permit reasonable access to their facilities by a narrow, carefully defined group of speakers: federal candidates. The issue before the Court is whether Section 312(a)(7), as implemented by the Federal Com-

munications Commission below, is a constitutionally acceptable mechanism, incident to the spectrum allocation function, for advancing the First Amendment interests of the public and candidates without unduly infringing upon the broadcasters' discretion.

Amici, who are past and possibly future federal candidates, and members and representatives of the listening and voting public, believe that the Commission's carefully balanced and minimally intrusive implementation of Section 312(a)(7) is constitutionally sound and supported by the record. The Commission afforded great weight to the networks' editorial judgment, but properly determined that denial of access to the Carter-Mondale Presidential Committee under the circumstances of this case exceeded the bounds of reasonableness.

ARGUMENT

I. THE REQUIREMENT OF SECTION 312(a)(7) THAT BROADCASTERS PROVIDE REASONABLE ACCESS TO FEDERAL CANDIDATES ADVANCES THE OBJECTIVES OF THE FIRST AMENDMENT.

A. Section 312(a)(7) of the Communications Act Protects the Public's Right to Access to Political Speech.

As this Court so eloquently stated in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969):

> It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. [Citations omitted.] "[S]peech concerning public affairs is more than self-

> expression, it is the essence of self-government." [Citations omitted.] It is the right of the public to receive suitable access to social, esthetic, moral, and other ideas and experiences which is crucial here.

As the court below observed, "The public's right to be informed is nowhere stronger than in the area of elections. And, no speech is more protected than political speech."[6] "To give increased play to ideas touching the very essence of our democracy is a goal that surely lies near the heart of the first amendment."[7]

What is at stake in this case is the public's right to have access to the speech of candidates on the electronic media, rather than being unreasonably deprived of that speech by broadcasters pursuing their own private economic interests.

> Candidate access to radio, and especially television, is exceedingly important in a nation that places such extraordinary reliance on this informational media, [footnote omitted] and we dare not forget that there is also a potential for evil in leaving the question of access in the hands of private broadcasting interests.[8]

Section 312(a)(7) of the Communications Act is a narrow, minimally obtrusive tool designed to ensure that the public will not be denied access to candidate speech without good reason, while affording wide latitude to broadcasters in the exercise of their editorial function.

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[6]Opinion for the court below in this case, Appendix A to "Appendices to Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" (Pet. App. A) at 45a.

[7]Tamm concurrence in this case below, Pet. App. A at 67a.

[8]*Id.*, Pet. App. A at 65a-66a.

It is precisely because political speech is so critical to the ability of the electorate to govern itself,[9] that candidate speech has always been afforded special protection. The public is entitled to hear candidates speak as they see fit. Broadcasters are licensed to use the airwaves temporarily as trustees,[10] and they may not, without unduly infringing upon the First Amendment rights of candidates and the public, refuse to sell reasonable amounts of broadcast time for direct advocacy by a federal candidate at a time when, by all objective indications, a campaign, is well underway. The three commercial television networks,[11] by refusing to sell any of the time requested by the Carter-Mondale Presidential Committee, and by not offering any reasonable alternative proposals, have violated the public's right to have access to speech by candidates, a right that is central to the First Amendment, broadly protected by the public interest standard of the Communications Act, and specifically delineated by Congress in Section 312(a)(7).

The networks would have this Court believe that Section 312(a)(7) involves only the conflicting rights of those wishing to speak: broadcasters and candidates.[12] The net-

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[9]*See, e.g., Buckley* v. *Valeo, supra,* 424 U.S. 1 at 14-15 (1976).

[10]That "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (*Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 390) should by now be beyond dispute.

[11]CBS Inc. (CBS), American Broadcasting Companies, Inc. (ABC), and National Broadcasting Company, Inc. (NBC), petitioners herein.

[12]This theme pervades respondents' briefs. The networks contend that the Commission's application of Section 312(a)(7) ignores the public by protecting candidate speech (CBS Br. at 45 and NBC Br. at 49), and they suggest that broadcasters are entitled to determine, without administrative or judicial reviews, what the listening public ought to hear (see CBS Br. at 45-46). What the networks' rhetoric fails to conceal is their paternalistic perspective that whatever speech broadcast licensees choose to carry must be what the public needs to hear.

works still seem to believe "that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[13] Sadly, they remain insensitive to this Court's clear guidance that the First Amendment protects not only those who wish to speak, but those who wish to listen as well.[14] Section 312(a)(7) was intended[15] to promote the public's right to receive political speech, and it is that most critical right that *amici* urge the Court to protect.

B. The Limited, Affirmative Right to Access Mandated by Section 312(a)(7) is Consistent with the Critical Role that Political Speech Plays in a Democracy.

Petitioners ABC, CBS, and NBC contend that the Commission and the court below improperly concluded that

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[13] *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 386.

[14] As enunciated in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee (CBS v. DNC)*, 412 U.S. 94 at 102 (1973), "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty."

[15] Although the legislative history of Section 312(a)(7) is not without ambiguity, *amici* believe that the interpretation contained in the brief of respondents United States and Federal Communications Commission assesses the intent of Congress as accurately as possible. Petitioners have offered no compelling indications that the Commission's interpretation is wrong, and it is therefore appropriate for this Court to afford the Commission's interpretation great deference. *CBS* v. *DNC, supra*, 412 U.S. at 121-23; *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 381; *Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965); *Commissioner* v. *Sternberger's Estate,* 348 U.S. 187, 199 (1955); *Hasting's & D.R. Co.* v. *Whitney,* 132 U.S. 357, 366 (1889); *United States* v. *Alexander,* 12 Wall. 177, 179-81 (1871); *Surgett* v. *Lapice,* 8 How. 48, 68 (1850).

Section 312(a)(7) imposes an affirmative right of access,[16] and that such a right would impermissibly intrude upon the broadcasters' own First Amendment rights.[17] *Amici* believe that the networks are wrong: they fail to appreciate the critical role of political speech and they mischaracterize this Court's prior interpretations of access issues.

Political speech on the electronic media has always been afforded special protection compared to other types of speech. Candidates' right to equal opportunities to use each broadcast station's facilities was recognized in the first broadcast legislation[18] and adopted in the Communications Act of 1934.[19] No other group of speakers was afforded a specific, personal right of access.[20] Moreover, broadcasters are accountable for all speech they carry except that of candidates, whose speech may

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[16]ABC concedes that the Section "confirms a *general* right of access" (ABC Br. at 14, 21), but that review by the Commission of a broadcaster's denial of access to any individual candidate would be impermissible (ABC Br. at 43-49, CBS Br. at 14-34, NBC Br. at 34-49). Whatever right ABC perceives, ABC apparently believes it to be an unenforceable one.

[17]See ABC Br. at 30-32, CBS Br. at 34-49, NBC Br. at 17-33.

[18]Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162.

[19]48 Stat. 1088 (1934), 47 U.S.C. § 315 (1976).

[20]The Commission, first in case law and later by regulation, has identified two other circumstances in which individuals (or their supporters) should have a contingent right of access: to respond to personal attacks or to political editorials. These administratively determined access rights were specifically upheld by this Court in *Red Lion Broadcasting Co.* v. *FCC, supra,* and noted more recently in *CBS* v. *DNC, supra,* 412 U.S. at 112 n.10. The networks accurately point out that all three of these circumstances involve prior broadcaster decisions, rather than initial, affirmative rights of access. But the prior lack of access rights not triggered by broadcasters' actions is precisely why Section 312(a)(7) needed to be enacted.

not be censored.[21] In addition, broadcasters selling time to candidates during certain specified periods must offer favorable rates.[22] To accommodate possible problems the broadcasters might face as a result of these obligations, the Commission has provided for certain special protections for licensees carrying such programming.[23]

While the Communications Act prior to the 1972 amendments did not expressly compel any broadcaster to provide access to a candidate for public office, the Commission has long maintained that a broadcaster failing to provide any discussion of political campaigns could not be considered to be meeting its obligation to cover controver-

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[21]Broadcasters are prohibited from censoring candidate uses, 47 U.S.C. § 315(a) (1976).

[22]47 U.S.C. § 315(b)(1) (1976).

[23]Of particular note are a guideline permitting broadcasters to increase the amount of advertising they sell during periods of high political demand without Commission oversight, 47 C.F.R. § 0.281(a)(7)(iii); a ruling that broadcasters need not permit private citizens personally attacked by candidates to respond, *Amendment of Part 73 of the Rules Regarding Personal Attacks, and Applicability of the Fairness Doctrine to Section 315 "Uses,"* 78 F.C.C.2d 457 (1979); and a line of cases maintaining that in a campaign, fairness doctrine rights and obligations are normally confined to determinations as to whether a broadcaster has provided a reasonable opportunity for the presentation of conflicting viewpoints on the issue of "who among all the competing candidates should be chosen." *The Law of Political Broadcasting and Cablecasting,* 60 F.C.C.2d 2209, 2301 (1978). Under this case law, candidates are not deemed to have a personal right of access under the fairness doctrine to discuss why they should be elected. (Of course, candidates may get equal opportunities in response to presentations by opposing candidates under 47 U.S.C. § 315(a) (1976).)

Amici's purpose in describing these provisions is not to endorse them; rather, they are presented to illustrate that while Congress has imposed special responsibilities on broadcasters with respect to political broadcasting, the Commission has simultaneously accorded broadcasters special treatment when they provide speech by and about candidates.

sial issues of public importance.[24] But this general responsibility under the public interest standard of the Communications Act,[25] as interpreted by the Commission, is distinct from the specific obligations imposed by Section 312(a)(7) in two significant respects: the public interest standard has been considered to permit broadcasters broad discretion in determining which campaigns to cover,[26] permissibly ignoring some altogether; and the standard allows broadcasters to satisfy their fairness doctrine obligations while providing limited or possibly no access to candidates at all, so long as their overall coverage of the issue of who should be elected is adequately and reasonably balanced.[27] The public interest standard of the Communications Act, therefore, compels no affirmative or contingent right of access for any individual candidate.

Amici agree with respondents' conclusion that while no candidate had an individual, affirmative right of access prior to the enactment of Section 312(a)(7), this statutory imposition of a limited personal right of access for federal candidates is a logical measure implementing the more general special treatment that political speech has always been accorded.

Petitioners contend that the lack of an affirmative right of access for candidates prior to the enactment of Section

[24] *Licensee Responsibility as to Political Broadcasts,* 15 F.C.C.2d 94 (1968):

> [T]he presentation of political broadcasts, while only one of the many elements of service to the public, . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate — in turn so vital to the proper functioning of our Republic.

[25] 47 U.S.C. § 303 (1976).

[26] *See Commission Policy in Enforcing Section 312(a)(7) of the Communications Act,* 68 F.C.C.2d 1079, 1091 (1978).

[27] *See, e.g., Rockefeller for Governor Campaign,* 59 F.C.C.2d 649, 650 (1976).

312(a)(7), combined with this Court's *dictum* in *CBS* v. *DNC* that the Section "essentially codified the Commission's prior interpretations of § 315(a) as requiring broadcasters to make time available to political candidates,"[28] compels the conclusion that Section 312(a)(7) imposes no right of access for federal candidates.[29] *Amici* believe that the networks are misinterpreting the language of *CBS* v. *DNC*. *Amici* understand the Court's *dictum* in *CBS* v. *DNC*[30] to be a recognition of the special role that political speech plays and an acknowledgment that broadcasters have long had some responsibility to disseminate political speech. Section 312(a)(7) was not a radical departure from the way political speech had always been treated.

But a finding that Section 312(a)(7) is consistent with the First Amendment and with the public interest standard of the Communications Act hardly supports a conclusion that the Section imposes no affirmative right of access, much less that this Court so held in *CBS* v. *DNC*. Whether the Section is considered to create a right of access for federal candidates, or merely to acknowledge or codify for certain speakers a right that had previously been recognized more generally, *amici* agree with the Commission and the court below that Section 312(a)(7) is a Congressional enactment of an affirmative right of access. It is a carefully drawn, highly specific right, limited to a narrow, exceedingly important class of speakers — federal candidates, affording them some preferential treatment over

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[28]*CBS* v. *DNC*, *supra*, 412 U.S. at 113-14 n.12.

[29]See particularly CBS Br. at 14-34 and NBC Br. at 34-49.

[30]What was before the Court in *CBS* v. *DNC* was whether the Commission was compelled, under the First Amendment, to require broadcasters to provide some access, when sought to be purchased by private citizens, in addition to the broadcasters' fairness doctrine obligations. The Court did not determine whether Congress or the Commission could impose a general or more limited right of access for private citizens.

non-federal candidates.[31] Occasional administrative and Court review to determine whether a particular denial of access is unreasonable is entirely appropriate to protect the public's right to hear candidates speak.[32]

C. Section 312(a)(7) Accommodates the First Amendment Rights of Broadcasters, Candidates, and the Electorate.

While Section 312(a)(7) imposes an affirmative right of access for federal candidates, it is one of the most carefully limited grants imaginable. The Commission's enforcement policy has recognized the need for affording the widest permissible broadcaster discretion. Broadcasters may reasonably refuse to sell time on a particular day,[33] at a particular hour,[34] or in a particular format,[35] provided that the access they do permit reasonably accommodates

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[31]The legislative history is silent as to the reason for limiting this right to federal candidates. It is worth noting, however, that federal officials represent larger geographic areas than most local officials. Moreover, Congress could have reasonably concluded that federal candidacies are more likely to have public importance than are local or state campaigns.

[32]*See* Section IA, *supra.*

[33]A broadcaster need not be subjected to undue disruption of regular programming, *see, e.g., Hon. Pete Flaherty,* 48 F.C.C.2d 838 (1974).

[34]While broadcasters may not refuse to sell at least some time during a particular part of a broadcast day, such as prime time (*Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971,* 47 F.C.C.2d 516 (1974); *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, supra,* 68 F.C.C.2d 1079, 1090), the precise placement of a program is a decision left to the broadcaster. *Commission Policy in Enforcing Section 312(a)(7), id.* at 1091.

[35]Broadcasters need not sell the precise program lengths that federal candidates seek to purchase (*Hon. Pete Flaherty, supra; Don C. Smith,* 49 F.C.C.2d 678 (1974); *WALB-TV, Inc.,* 59 F.C.C.2d 1247 (1976); *Hon. Donald Riegle,* 59 F.C.C.2d 1314 (1976), although broadcasters must allow a sufficient variety of access opportunities to

the candidate's needs.[36] The total amount of time provided to candidates is also largely left to the broadcasters' discretion.[37]

Petitioners suggest, however, that broadcasters should have both initial and ultimate discretion as to what is reasonable.[38] Even the threat that a dissatisfied candidate

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accommodate differing candidate needs and ability to pay *(Senator Frank Church,* 37 Rad. Reg.2d (P&F) 337 (1976); *Campaign '76 Media Communications, Inc.*, 58 F.C.C.2d 1142 (1976); *Ed Noble for U.S. Senate Committee,* 79 F.C.C.2d 903 (Broadcast Bureau 1980)).

[36]Consideration of candidate needs, the criterion employed in this case that the networks most strenuously oppose (NBC Br. at 21-27, ABC Br. at 39-41, CBS Br. at 37), has always been an appropriate element in assessing what constitutes reasonable access. If there is a single unifying theme in the Commission's past resolution of reasonable access cases, it is that a broadcaster's refusal to sell the type of access sought must be evaluated by balancing the broadcaster's ability to sell the program length requested, against the suitability of alternative formats (length and frequency) that might satisfy the candidate's financial and substantive needs. This case represents no departure from prior analysis, though the Commission herein described its review process more thoroughly than before.

[37]The Commission has indicated generally:

> Stations are expected to devote time to campaigns of state and local candidates in proportion to the significance of the campaigns and the amount of public interest in them. However, the law does not require stations to permit access to candidates for *every* non-Federal office, whereas it does require them to permit access to all candidates for Federal office if the candidates request it.

The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2286 (1978).

[38]*See, e.g.*, CBS Br. at 38-39:

> The inescapable effect of the new right of access that the Commission and the court of appeals have discerned is to wrest editorial judgment from the broadcaster and to place it in the candidate and ultimately the Commission. Yet candidates are under no obligation to weigh the overall public interest in the use of broadcast facilities and the Commission is not charged with an editorial role.

might seek Commission assistance would, the networks say, unduly restrict their editorial judgment.[39] But the ability to make unreviewable denials of access is the ability to control who may speak to the American public, and when. To give broadcasters final authority over candidate access would permit them "to snuff out the free speech"[40] of those seeking office. Broadcaster discretion over candidate access, however broad, must be subjected upon occasion to governmental oversight.[41] The existence of administrative and judicial review permits exercise of broadcaster discretion in the first instance, but ensures that the public's right to access to candidate speech will not be unreasonably denied.

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[39]ABC Br. at 39: "Under this scheme, broadcasters are effectively precluded from attempting to treat a campaign as a whole by assessing and responding to the needs of all candidates uniformly." Also, "requiring broadcast media access from the date when the Commission says the campaign has begun and requiring deference to an individual candidate's perceived 'needs' — effectively anoints the Commission as the ultimate decisionmaker in all matters of political access . . . . — a process of second-guessing broadcaster judgment that defies rational explanation and conflicts with deeply embedded past precedent." ABC Br. at 41. *See also* NBC Br. at 16-33.

[40]*Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[41]The review occurs but rarely. Since Section 312(a)(7) was enacted, 435 Congressmen have been elected five times, over 150 Senatorial contests have taken place, and three Presidential elections have been held. Most, if not all, of the 5,000 or so candidates involved have probably sought access to one or more of the nearly 10,000 radio and television stations in the country. Yet the Commission has reported only approximately two dozen cases in which complaints were filed requiring Commission "intervention." The case before the Court is the first in which appellate review was properly sought (*Morrisseau* v. *Mansfield Television, Inc. et al.,* 380 F.Supp. 512 (D.Vt. 1974) was dismissed for lack of jurisdiction). Despite the expressed fears of the networks (*see, e.g.,* ABC Br. at 37 n. 49) that the Commission will be called upon much more often in the future to review broadcaster denials of access, there is no logical basis for those fears and no factual evidence whatsoever.

II. THE FINDING THAT REASONABLE ACCESS WAS DENIED IS SUPPORTED BY THE RECORD IN THIS CASE.

A. The Commission's Criteria are Appropriate, Carefully Enunciated, and were Soundly Applied to the Circumstances of this Case.

Assuming that there is no constitutional bar to the Commission's occasional review of whether a particular denial of access to a federal candidate is unreasonable,[42] and that such a review is authorized under the public interest standard of the Communications Act, by Section 312(a)(7), or both, then the issue to be resolved is whether the Commission's review in this case was conducted properly and resulted in a determination supported by the record. As the court below found, the Commission's analysis in this case was appropriate and the finding that access had been denied unreasonably is well supported by the facts herein.

To reach its determination that the access request of the Carter-Mondale Presidential Committee was timely, the

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[42]As *amici* read this Court's statement on the constitutionality of forced access, the First Amendment does not prevent Congress or the Commission (incident to its frequency allocation authority) from imposing appropriate, narrowly drawn, access schemes. *See Red Lion Broadcasting Co.* v. *FCC, supra* (responses to personal attacks and political editorials); *CBS* v. *DNC, supra* (broadcasters need not be compelled to provide access to non-candidates; the issue as to whether they could be so compelled was not addressed); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) (general right of access to cable held overly broad); *Consolidated Edison Co.* v. *Public Service Commission*, 100 S.Ct. 2326, 2336 (1980) (even though billing envelopes, unlike the broadcast spectrum, are not a scarce resource, a utility disseminating one-sided discussions of controversial issues of public importance "might be ordered lawfully to include [opposing viewpoints] in the billing envelope"). If a licensee may be required "to share his frequency with others," *Red Lion, supra* at 389, then the government which imposes the obligation has a responsibility to protect against violations of the rights of those seeking access and those seeking to receive the speech of others.

Commission examined objective evidence as to whether the campaign had in fact begun. The Commission reviewed undisputed evidence that as of mid-November, 1979, ten candidates had already announced their intention to seek the Republican nomination, two the Democratic nomination; the delegate selection process was underway; candidates and their supporters were traveling, speaking, and raising funds; national campaign organizations were in operation; the Iowa Caucus was but two months off; endorsements had already been made; and the print and electronic media were providing extensive coverage of the campaign.[43] This examination convinced the Commission that the only reasonable conclusion was that the campaign was in full swing (Pet. App. B at 94a).

The networks offer no evidence and few arguments to rebut this conclusion.[44] Instead, they contend that any review of a broadcaster's judgment as to whether an access request is timely or premature is an impermissible intrusion on the broadcaster's discretion.[45] They imply that the

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[43]Pet. App. B at 92a-94a. The Commission did not rely on the amount of electronic media coverage to reach its conclusion that the campaign was in full swing, out of concern that depending on evaluations of broadcast news coverage "would mean that a broadcaster could deny a candidate reasonable access simply by refusing to provide news coverage of a campaign." Pet. App. B at 94a n.26.

[44]*See* NBC Br. at 17-21, ABC at 37-39, and CBS Br. at 36-37. CBS' position as to whether the campaign was sufficiently underway to warrant provision of access differs from that of the other two networks. NBC and ABC made firm decisions that December was too early to sell time to any candidate, while CBS was willing to offer five-minute program periods, on the basis that while some access might be timely, "the public interest would not be served by selling large blocks of time to candidates so far in advance of the election." CBS Br. at 36.

[45]*See particularly* CBS Br. at 36-37; ABC Br. at 38 ("the suggestion that the Commission has some special competence to make this determination [as to when a campaign has begun] is little more than an arrogation of governmental power"); and NBC Br. at 18 n.*.

Commission did something other than determine whether the networks' refusal in this case failed to constitute "reasonable licensee discretion."[46] Yet that is all that the Commission did determine in this case. The evidence did not support a reasonable conclusion to the contrary: that the campaign had not yet begun.

As ABC quite properly points out (ABC Br. at 39), a determination that a campaign is underway does not compel a finding that broadcast time must be sold. The Commission's analysis below is fully consistent with that observation. A finding (reasonably reached by a broadcaster or determined by the Commission to be not reasonably disputable) that a campaign has begun simply starts the analysis as to whether access may reasonably be denied.

The criteria enunciated by the Commission as appropriate considerations for determining whether access need be granted[47] were carefully applied by the Commission to the facts of this case. Because the statements of the case presented by petitioners and respondents amply describe the circumstances at issue, *amici* will limit the discussion herein to a few significant points.

The request made by the Carter-Mondale Presidential Committee could not have been more accommodating of the networks' needs. It was a request to purchase a single half hour at regular commercial rates, during any of several half hour, prime time slots on any of four days. The re-

[46]NBC Br. at 18 n.*.

[47]As summarized by the court below, these include:

> (a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and (e) the timing of the request.

Pet. App. A at 33a.

quest was made two months ahead of time. As explained by the candidate's campaign committee, the timing was necessary to coincide with the candidate's announcement to seek reelection and with prearranged fundraising gatherings around the country. Moreover, the half hour was requested to enable the candidate to discuss his past three years in office and the reasons why he should be reelected. It was the candidate's first request for access.

But all three networks refused. They described no major disruption of their regular programming that the access would entail and offered mere speculation about other potential requests were one of the candidates to be permitted access. They were unconcerned with the fact that the candidate expressed strong need for the requested access. Instead, the networks decided that their regularly scheduled comedies, sports, and other nonpolitical programming, combined with the networks' own news coverage,[48] were sufficient[49] to satisfy the public's right "to receive suitable access to social, esthetic, moral, and other ideas and experiences,"[50] including political speech.[51] The networks offered no alternative access that might have satisfied the

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[48]NBC Br. at 33: "there is no contention here, nor could there be, that at the time of his request Mr. Carter had not received enormous amounts of coverage on the NBC Network;" and CBS at 46: "In any event, the public interest in receiving information on political matters is fully served by the broadcaster's journalistic coverage [footnote omitted] and the preexisting Commission policy [as contrasted with its interpretation of Section 312(a)(7) in this case]."

[49]*See, e.g.*, CBS Br. at 36.

[50]*Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 390.

[51]Indeed, it is of particular importance that candidates have the unfettered opportunity to make their own views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. *Valeo, supra,* 424 U.S. 1 at 52-53 (1976).

candidate's needs, and failed to explain why their denials were reasonable. Under these circumstances, the Commission had no choice but to find that access had been unreasonably denied.

B. The Risk of Partisanship Created by Assessing the Needs of Individual Candidates or by Commission Review of Broadcasters' Denial of Access is Outweighed by the Alternatives of Rigid Government Standards or Monopolistic Private Control Over the Electoral Process.

Judge Tamm, in his concurrence below,[52] and all three of the networks[53] have expressed a concern that Section 312(a)(7), as implemented by the Commission, carries some risk of government nonneutrality. *Amici* agree, but share Judge Tamm's view[54] that the risk of governmental partisanship has been satisfactorily contained so long as the Commission, as it has in this case, carefully follows the standards it has enunciated in implementing Section 312(a)(7).

Enunciation and application of neutral standards is one very important protection against governmental partisanship. There are others as well. While the networks accurately point out [55] that Commissioners are appointed by the President and often choose not to serve their full seven-year term (thereby permitting Presidents more than the approximately one per year that Congress specified), the Communications Act prohibits more than four Commissioners to be members of the same party.[56] Commissioners

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[52] *Passim*, Pet. App. A at 56a-68a.

[53] CBS Br. at 46-48, NBC Br. at 20-25, ABC Br. at 43-49.

[54] Pet. App. A at 67a.

[55] *See, e.g.*, NBC Br. at 21-22 n.*.

[56] 47 U.S.C. § 4(b) (1976).

are traditionally members of the two major parties, and may at times be unsympathetic to the inequities that third party candidates often face, but the Communications Act does afford some protection against partisanship.[57] Equal protection principles guarantee that the Commission's case law will be applied similarly to complaints from candidates of any political party.

Another powerful protection against possible governmental nonneutrality is the existence of competing candidates' rights to equal opportunities once access has been provided under Section 312(a)(7).[58]

A further protection against Commission partisanship is the requirement that Commission decisions be made in open meetings. Members of the public may attend (or obtain tapes of) meetings, and draw attention to apparent partisanship.

Most importantly, the existence of court review is a very significant check on any Commission partiality. Any Commission finding that a denial of access was or was not reasonable must be based on the record, and if the deci-

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[57]As Judge Tamm (Pet. App. A at 64a-65a n.16) and NBC (NBC Br. at 22 n.*) point out, there have at times been inexcusable pressures from the White House placed on broadcasters. But the Commission is an independent regulatory agency subject to Congressional scrutiny and judicial review, and no sitting President has ever succeeded in having a broadcaster lose a license. That improper Presidential pressures must surely be guarded against, however, bears little relevance to this case.

[58]*See* Tamm concurrence, Pet. App. A at 68a n.22. Thus even if the opposing candidate might not have succeeded in obtaining access on his own, contingent access is assured by Section 315.

sion lacks objective support, it can and should be overturned by the courts.[59]

As discussed previously (note 23, *supra*), Commission intervention to ascertain whether Section 312(a)(7) has been violated is rare. As with the best kind of safety net regulation, the success of Section 312(a)(7) can be judged by its self-enforcing impact in actual operation. The mere presence of the statute has tended to encourage voluntary compliance. The scarcity of past Commission decisions under the Section illustrates that the Commission policies and procedures encouraging negotiation and conciliation have been successful in minimizing governmental intrusion.

If the public's right to access to political information is to be protected, there are only two alternatives that *amici* see to the present scheme. One is rigid, arbitrary governmental standards establishing a uniform mandatory system of access for all candidates, without regard to individual candidate or broadcaster needs. The other is relying on broadcasters' good faith to put the public interest in every case above the broadcasters' financial interests. But both of those alternatives have serious drawbacks.

The networks already have enormous control over what information the American public receives.[60] Broadcasters

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[59]A candidate denied access may take an appeal. A broadcaster found to be unreasonable and continuing to refuse to provide access may take an appeal. A candidate opposing one provided access may request equal opportunities and if refused, may complain to the Commission and appeal to the Courts. Thus a wrong decision by the Commission is not without recourse.

[60]*See, e.g.*, T. Emerson, *The System of Freedom of Expression* (1970); *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 392; Tamm concurrence, Pet. App. A at 65a-66a; Brennan and Marshall dissent in *CBS* v. *DNC, supra,* 412 U.S. at 195: "Indeed, the electronic media are today 'the public's prime source of information' " (footnote omitted).

have nearly unlimited discretion to determine what issues get discussed, when, and by whom.[61] Except for the contingent access recognized under Section 315 of the Communications Act and the Commission's personal attack and political editorializing rules, and except for the limited affirmative right of access imposed by Section 312(a)(7), "broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and, perhaps most important, who shall speak."[62] In view of the enormous impact of the electronic media in shaping the public's opinions, and of the almost total control that broadcasters have over the public's access to information, a decision to leave candidate access entirely in the discretion of broadcasters would seriously jeopardize the integrity of the electoral process. However well intentioned and nonpartisan the networks (and other broadcasters) might be, their power to determine what candidates may speak to the American public and when cannot be insulated from review. Commission and court oversight, however rare, is absolutely vital to protect the public's fundamental right to access to ideas on these most crucial media – a right that is essential to informed self-government.

Though ultimate licensee control bears enormous risks, rigid governmental standards are also undesirable. Across-the-board mandatory standards establishing amounts, types, and timing of access for political speakers would deprive broadcasters to a far more significant extent of their editorial discretion, and would be likely to deprive candidates of their right to speak as they choose, consistent with their individual needs and strategies. Such a result would seriously impede the First Amendment.

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[61] *See, e.g.,* dissent by Justices Brennan and Marshall in *CBS* v. *DNC, supra,* 412 U.S. at 182-92 and Commission policy statements stated *id.* at 186 n.20.

[62] *Id.* at 186.

In short, Congress made a very sound choice when it enacted Section 312(a)(7). By imposing a limited right of affirmative access for a narrow group of special speakers, Congress struck a careful balance of competing First Amendment rights, enhancing the ability of the public to get access to candidate speech while intruding minimally on broadcasters' discretion. The Commission's implementation of the Section over the years, and specifically in this case, has been consistent with the delicate balance that Congress struck, and fully cognizant of the competing rights that the First Amendment protects.

The Commission's decision in this case was appropriate, fully supported by the record, and in furtherance of First Amendment goals; the Court of Appeals' decision upholding the Commission should be affirmed.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be affirmed,

Respectfully submitted,

HEIDI P. SANCHEZ
ANDREW JAY SCHWARTZMAN
DEBORAH C. COSTLOW

MEDIA ACCESS PROJECT
1609 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 232-4300

Counsel for Amici Curiae

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